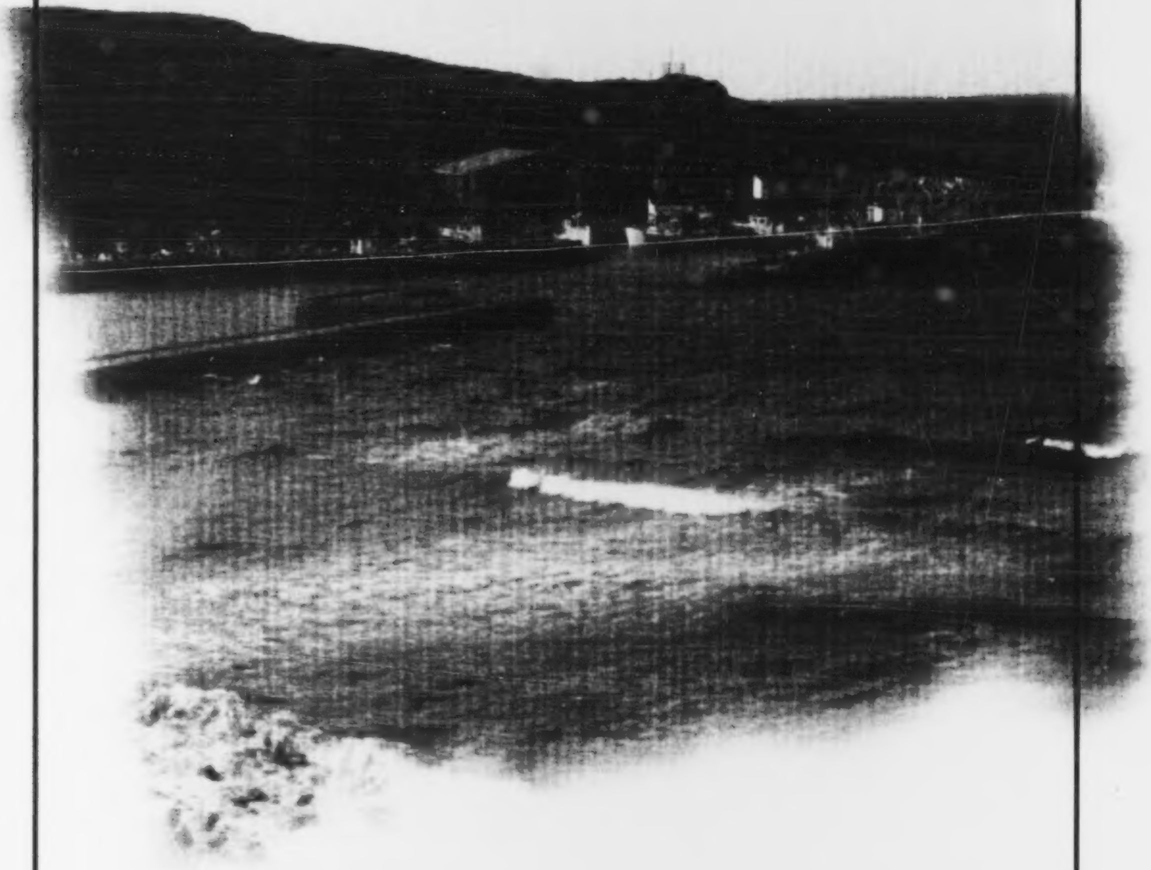
A REVIEW OF THE FISHING INDUSTRY COLLECTIVE BARGAINING ACT



A FRAMEWORK FOR STABILITY

October 3, 2003

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October 3, 2003

The Honourable Percy Barrett
Minister of Labour

The Honourable Yvonne Jones
Minister of Fisheries and Aquaculture

Government of Newfoundland and Labrador
P.O. Box 8700
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Dear Ministers:

In accordance with the Statement of Work given to me as my Terms of Reference I present my report, entitled, *A Review of the Fishing Industry Collective Bargaining Act: A Framework for Stability*, for your consideration. I trust that its findings and the recommendations and suggestions it contains will be of benefit to you and will assist fish harvesters and fish harvesters, government and all other interested stakeholders in promoting, facilitating and maintaining labour relations stability in the fishing industry.

Yours truly,

David W. Jones

DAVID W. JONES, Q.C.

ACKNOWLEDGEMENTS

As is only proper, right and fitting, I would like to express my sincere thanks to the persons who participated in this process and contributed to the completion of this study. I am indebted to the fish harvesters, processors, government officials, industry observers and other interested parties who took time from their busy schedules to make presentations and participate in round table discussions during the consultations phase of this study all around this province. Equally, I am indebted to the leadership of the Fish Food and Allied Workers/ Canadian Auto Workers Union, and in particular Mr. Earl McCurdy, and the leadership of the Fisheries Association of Newfoundland and Labrador, and in particular Mr. Alastair O'Rielly, for all of their assistance in responding to my many questions and inquiries related to this work. They were invaluable to getting at the root causes of the problems and the opportunities that face us in this industry, in shaping my thoughts, and the direction of this report.

No question from me was too trivial or complex for them to formulate a response. Even when they disagreed with each other, or a proposition or a direction that I was advocating, I was always impressed with their candour, their concern and their consideration for the well-being of this province and the industry of which they are all a vital part.

I can state with all frankness that every person who took part in this study was and is concerned with the well being of their fellow Newfoundlanders and Labradorians and the fate of the industry.

In this we are unique as a people. It is this sense of shared purpose and wanting to do that which ultimately is in the common good which gives me the greatest sense of optimism for the success of the fishing industry. Combined with the recommendations of this report, I believe in our great potential as a people to create the kind of long term labour relations stability in the fishing industry that we need and want, if our province and this industry is to grow and prosper.

Lastly, I would be remiss if I did not thank the Government of Newfoundland and Labrador, and in particular the Minister of Labour, the Honourable Percy Barrett and the Minister of Fisheries and Aquaculture, the Honourable Yvonne Jones, for all the trust and confidence that they have reposed in me and for making available to me two dedicated and resourceful public servants in the persons of Ms. Jacqueline Power, of the Department of Labour, and Mr. Brian Delaney, of the Department of Fisheries and Aquaculture, to assist me in this process. Without their help and assistance this work would not have been possible.

To them and each and every one of my fellow Newfoundlanders and Labradorians who took part in this process, my thanks.

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EXECUTIVE SUMMARY

Introduction

When the Government of Newfoundland and Labrador contacted me to request that I undertake a review of the *Fishing Industry Collective Bargaining Act*, I was on vacation in Ireland. Given my passion for this province and my deep belief in our future, it is no coincidence that I might choose to vacation in a country that has lessons to teach us. Ireland has turned around its economy and set its course on a more promising future than many would have believed two short decades ago. It has recovered for a host of reasons, including hard work and a high commitment to collaboration. In the parlance of negotiators, a 'win-win' approach to problem-solving has produced solutions that are supported by the parties involved. The result has been an unprecedented recovery which many now try to emulate.

This is the essence of my findings and recommendations on the matters entrusted to me by the government. The parties to negotiations over fish prices, namely fish harvesters and fish processors, need to further entrench in themselves an attitude of collaboration in order to grow the industry and sustain that growth. I say "further entrench" and "grow the industry" because I believe that in the past five years these parties have made steps towards a collaborative existence and rescued a troubled industry.

The history of labour relations in this province's fishing industry is long - the longest of any working relationships. It is equally steeped in mistrust, not all of it unwarranted. However, its evolution has brought us to the precipice of unlimited possibilities - as long as there is real interest in the mutual gains that have been realized and that can continue into the future.

This is the second time in six years that the effectiveness of the legislation regulating labour relations in the fishing industry has come under review. This should not dismay the reader; instead, take it as a signal of a healthy tripartite commitment to learning and improving upon the manner in which the goals of the industry may be achieved.

The Model

The fundamental problem that led to the first review of labour relations in 1997 by the Vardy Task Force was mistrust and a traditional labour relations approach to collective bargaining that did not consider the importance of timely starts to harvesting. In a world where financial returns rely on harvesting a resource in its peak condition, delays can be disastrous. In this province's fishing industry, prior to 1998, when negotiations had no fixed time frame and the only conflict resolution mechanism was a strike or lockout, there were many delays in the start of fisheries. The worst was the three-month delay in the start of crab harvesting in 1997, which had a large negative economic impact on both sides, and damaged the industry's ability to reliably deliver a quality product to market. This is no longer the case.

I have found that the interest-based collective bargaining model, commonly known as the 'final offer selection model', used by the parties since 1998 and entrenched in the legislation in 2000, works well in settling disputes and should continue. Its prohibition on strikes and lockouts, rigid time-lines, use of facilitated interest-based negotiations, and use of final offer selection arbitration for dispute resolution have guaranteed that fisheries start on time. Newfoundland and Labrador is no longer viewed as a supplier of last resort. To date, since 1997, 31 collective agreements have been achieved through negotiation and 25 through arbitration under this process. The processors' final position was chosen by arbitrators in 11 cases; and the harvesters' in 14 cases. For the most part, and notwithstanding this year's crab lockout, fisheries have not been delayed and the industry's market position has improved. Both circumstances have also contributed to an improvement in the province's economy.

Continuance of the Model

Despite such success, the model and the legislation have come under attack by many who would prefer to abandon the same and advocate reversion to traditional collective bargaining or the adoption of a free market approach to business in the industry. Given where we are in our history and in the growth of this industry, I am not convinced that we should abandon such a successful regime, although it can be improved. Accordingly, I am recommending that government legislate to extend the life of the model for a further two-year period, after which it will continue again unless one of the recognized party to negotiations, representing either harvesters or processors, communicates an intention to opt out of the model. If they do, it will continue for one additional year, to give the parties the opportunity to resolve their differences or transition to a new collective bargaining reality without the model.

Changes to the Legislation

Arbitration: Three main themes have arisen in the discussion of issues about arbitration: the apparent reliance on arbitration as opposed to good faith negotiations; the scope of matters an arbitrator may consider when rendering a decision; and the method of arbitration employed, being a choice between final offer selection and conventional arbitration. After considering these matters, I find that there is little evidence that one party or the other is relying on arbitration to the detriment of good faith negotiations. Of 56 collective agreements produced under the model, 31 have been achieved through negotiations; 25 have been achieved through arbitration. If there is a chilling effect as a result of the possibility of arbitration, it is a small price to pay for stability and fisheries opening on time. Regarding the scope of matters available to arbitrators in discerning their responses, I believe the parties who designed the process, and who set terms and conditions of arbitration annually through the Memorandum of Understanding, should retain jurisdiction over this issue. It is not for me or government to interfere and broaden that scope of deliberations. Likewise, it is not government's role to force the parties to choose a specific method of arbitration or to allow the arbitrator to choose. Conventional and final offer selection are the categories from which the parties may choose. Their choice of arbitration is made before negotiations begin and will place different pressures on those negotiations. It would be counterproductive and most egregious to allow an arbitrator to choose conventional or final offer selection after an issue has been submitted for resolution. Where the parties to negotiation do not reach agreement on an alternative method of arbitration, final offer selection, (as the current legislation provides) should be the method employed.

Government has borne the cost of facilitation and arbitration since 1998. The current budget is $200,000. While government provides conciliation and mediation free of direct costs in other sectors, the costs of arbitration are absorbed by employers and unions. Notwithstanding this, in the fishing industry we are not dealing with traditional labour relations involving individual employers and their respective work forces. Given the importance of this sector to the economy of the province, and in the interest of managing a very public resource and the private and public benefits accruing from it, I am persuaded that we cannot afford to abandon the cost of underwriting these mechanisms. Indeed, if anything, there may be merit in increasing the amounts available for such purpose to ensure appropriate tripartite preventive mediation measures are taken to identify and address issues before a stacking effect occurs and they become major problems. This would appear to me to be a small cost to preserve labour peace.

Learning in the Industry: Industry parties, including arbitrators and facilitators, have identified a lack of 'learning mechanisms', for want of a better term. Arbitrators, specifically, indicated they feel they work in a vacuum, in isolation from each other and the industry, both throughout a season and from season to season. In addition, it is my observation that the joint technical committees, originally intended for the identification of issues specific to a given fishery, are not being used to their maximum potential. This is basically because they do not meet in time to identify and implement solutions or effect desired and necessary changes.

True learning organizations avail of every opportunity to exchange information and improve operations, and enjoy more success than their static competitors. To facilitate the fishing industry as a learning organization, I recommend annual de-briefing meetings in October, involving all parties, to examine the results of the previous season and to prepare for the upcoming season. The result of these meetings should be reported to the Ministers of Labour and Fisheries and Aquaculture for any requested action, as appropriate. The joint technical meetings for the next season should start after these debriefings.

Memorandum of Understanding: The Memorandum of Understanding (MOU) negotiated between the parties to collective bargaining, includes, among other things, guidelines for arbitration, terms regarding the role of the arbitrator, and terms regarding the resolution of disputes during the conduct of fisheries. The present provisions of the *Act* require the parties to negotiate a new MOU before December 31st in a given year, to ensure it is in place prior to scheduling of negotiations. Thereafter, it can only be achieved through arbitration.

Arbitration of an MOU is an expensive and time-consuming endeavour and, in my opinion, not always necessary. I believe it would be prudent to allow the Minister of Labour to make regulations setting out the framework rules for negotiations after the December 31st deadline, at the request of a party to negotiations, when one of the previous year's parties to the MOU has chosen not to re-engage in collective bargaining. In the absence of a change in the parties to the MOU, the *Fishing Industry Collective Bargaining Act* should also be amended to create a bridging mechanism to provide that where the parties to the previous year's MOU fail to execute a new MOU for the upcoming year by December 31st, the MOU between the parties for the previous year would automatically roll over. Such bridging mechanisms are common in collective agreements.

Re-Opener Clauses: At the present time, there is nothing in the *Act* which requires the parties to establish a schedule for arbitrating a re-opener clause. Neither is there a process to identify who will be the arbitrator and facilitator for a re-opener clause negotiation - although practically one would expect it to be the original facilitator and arbitrator. To address this situation I am recommending that the *Act* be amended to require a schedule to be established for negotiation and adjudication of any re-opener clause. The *Act* should be further amended to provide that the arbitrator and facilitator used during negotiations of a species should be the same for negotiation of a re-opener for that species. Additionally, the *Act* should be amended to provide that re-opener clauses will be negotiated and arbitrated within one week of the occurrence of the event giving rise to the triggering of the same, so as to avoid a cessation in business dealings.

Enforcement of Collective Agreements: Under the *Labour Relations Act*, all parties have the right to appeal to the Board to make a determination regarding the binding effect of a collective agreement. Under the *Fishing Industry Collective Bargaining Act*, this avenue is available only to an accredited processors' organization. The fact is that under the legislation neither FANL, because it is not accredited, nor a single processor has standing before the Board to seek a determination that a collective agreement is binding. To address this situation I am recommending that the *Fishing Industry Collective Bargaining* Act and the *Labour Relations Act* be amended to provide access to the Board for any party wishing to determine the binding effect of a collective agreement in the fishing industry.

An order or determination of the Board made in respect of such a labour relations matter should be immediately capable of being filed by a party to a hearing before that Board as a judgment of the Supreme Court of Newfoundland and Labrador, Trial Division and enforceable 48 hours after such filing without any waiting period, and government should make the necessary amendments to the *Labour Relations Act* and the *Fishing Industry Collective Bargaining Act* to make this so.

I agree with many observers that labour relations matters in the fishing industry should be dealt with in an expedited manner and by a panel that is knowledgeable of the same. A special panel of the Board, with expertise in fishery and labour relations issues, should be established to deal with any and all labour relations matters where the Board is called upon to make a decision relative to the *Fishing Industry Collective Bargaining Act*.

Valid collective agreements, once reached, should be enforceable by the parties to them against one another and others bound by them. When one of the parties questions the application or interpretation of a collective agreement, or a portion thereof, the normal labour relations route to redress is the grievance procedure culminating in arbitration. In the absence of overwhelming evidence that it is dysfunctional in this industry, I am not persuaded to abandon that process. I am, however, mindful of the time-sensitive nature of this industry, which sets it apart from others for the purposes of labour relations processes. I, therefore, recommend to the parties that they collaborate and simplify their current grievance procedure. To expedite resolution, I also recommend that, at the request of either party to a collective agreement, the Minister of Labour should be allowed to appoint an arbitrator who will resolve any outstanding grievance within seven days of that arbitrator's appointment. To facilitate this and to ensure a panel of arbitrators possessed of the necessary fishing industry expertise, I finally recommend that the parties to negotiations should provide the Minister of Labour with a panel of three such arbitrators from which to choose. Should they fail to do so, the default person should be possessed of this authority. The arbitrator's decision should be immediately capable of being filed with the Supreme Court of Newfoundland and Labrador, Trial Division, and enforceable 48 hours after doing so.

Additionally, any party to a binding collective agreement should be enabled, by the amended legislation, to file a grievance against a rogue party not honouring a collective agreement. This provision should enable a processor or processors' organization to file a grievance against another processor, a fish harvester, or a union bound by a collective agreement, and vice versa.

Furthermore, sections 18.1, 90, 123 and 124 of the *Labour Relations Act*, which deal with the enforceability of collective agreements and arbitration decisions, unlawful strikes and lockouts and the determination of rights flowing from an unfair labour practice or breach of a collective agreement that is binding on a party should be incorporated by reference and added to the *Fishing Industry Collective Bargaining Act.* The 14-day waiting period contained in section 90 of the *Labour Relations Act* should be eliminated so that a determination would be enforceable forty eight hours after such a finding. Also, provision should be made in the *Fishing Industry Collective Bargaining Act* for the making of interim cease and desist orders by the Board.

Related to the above and for greater certainty I am recommending that government amend the *Fishing Industry Collective Bargaining Act* to provide the Board with the authority to declare unlawful work stoppages or unlawful lockouts in the fishing industry and further that government cause the *Act* to be amended to provide that any party may complain directly to the Board about an unfair labour practice in the fishing industry.

Arbitration arising from a grievance regarding the interpretation or application of a provision in a collective agreement is known as 'rights arbitration.' These decisions are enforceable as orders of the court, as they are judgments about the collective agreement arising from the collective agreement itself. In December 2002, the *Fishing Industry Collective Bargaining Act* was amended to provide for court enforcement of decisions made through rights arbitration, the same as exists in section 90 of the *Labour Relations Act.*

Arbitration that sets the provisions of the collective agreement or a portion thereof, as in the price for a fish species, is known as 'interest arbitration.' Some parties would have me equate these decisions with rights arbitration decisions, and make them enforceable in a court of law.

Nowhere else in labour relations is a collective agreement or a provision of one enforceable on its own merit; all such questions must be taken through the grievance and rights arbitration process regulated by legislation. To allow the enforcement of a provision of a fishing industry collective agreement outside the normal process would be to hold the industry to an impossible standard. Notwithstanding this theoretical rationale, it would be unproductive of me or government to require the enforcement as the maximum price of what is currently a minimum price in a commodities market. Should a fixed price ever be negotiated, I believe it would be equally impossible for government to enforce the same in an environment characterized by harvesters and processors focussed on maximizing their economic returns.

Accreditation: The subject of accreditation has been one of the hottest and most debated topics related to the *Fishing Industry Collective Bargaining Act* in recent years. Under the *Act*, accreditation of a processors' organization is the parallel to certification of a bargaining agent for fish harvesters under the *Act*. All that it would give the accredited processors' organization is the right to enter into collective bargaining on behalf of all processors with the certified bargaining agent for fish harvesters. It would also provide standing in a similar manner that the *Act* now gives the union to take actions to enforce compliance with a binding collective agreement. It does not create a closed shop in the sense that an accredited processors' organization could refuse membership to a processor who wished to join it.

Some who appeared before me advocated accreditation by naming an organization of processors in the legislation; others suggested raising the membership threshold from members representing the majority of fish produced to members producing at least 75 per cent of the fish. I found no such argument convincing. There is no justification for naming an organization and thereby granting that organization accredited status as the bargaining agent, when the corresponding agent, the union representing harvesters, had to meet the *Act's* tests and will have to do so again if another union attempts to raid it or its members attempt to decertify it. Equally there is no rationale to increase the majority test of membership. Indeed, the statistics indicate that if the test had been 75 per cent of production, few grouping of processors would likely have formed any binding collective agreements in the last five years.

Likewise, I find no reason to change the terms and conditions underlying the binding effect of a collective agreement that is negotiated in the absence of an accredited processors' organization. Should such an agreement be signed by processors representing production of the majority of that species in the previous calendar year, then that agreement should be binding upon all processors of that species.

Opting Out: Opting out of the model has some utility, especially to a group of harvesters to which the right to strike or withdraw services has traditionally been the ultimate economic sanction against opposing processors and to processors wishing to lock out harvesters for similar reasons. However, in 2002, government and industry found that the time frame between the act of opting out and the beginning of the next fishing season was insufficient to transition to a new reality, or to create a new reality in the first place. Therefore, I am recommending, as did Howard Noseworthy in his 1999 review of the original pilot project, a one-year cooling-off period following the notification of opting out. I further recommend that the opting out period be changed to November 1 through December 31, so as to preclude the threat of opting out from being triggered by year two before debriefings and technical discussions begin. This is not a large departure from the current framework, given that December 31 is the deadline for withdrawal of the notice of intent.

Industry-to-Industry Collective Bargaining: In my search for new and innovative solutions to the problems facing the fishing industry, I have investigated the option of industry-to-industry bargaining, which facilitates negotiations between an organization of employers and a council of unions representing those employers' unionized workforces. It is most common in the construction sector and in sectors where special resource development related projects of large size and importance exist. Traditionally, each bargaining entity must have a constitution which meets the requirements of the legislation establishing it, and this generally includes a ratification procedure.

Aside from the requisite legislative framework, which currently exists in the *Labour Relations Act*, for this type of arrangement to garner success in the fishing industry the negotiating parties would have to willingly engage. As labour relations history indicates, within and outside the fishing industry, the absence of such willingness can doom the best designed regime. Certainly the fish harvesters already speak with one voice; therefore there is no need to form a council, with the reconciliation of viewpoints that this sometimes entails.

On the processing side, I believe if the thorny issues of mandatory fees and fair representation can be resolved, then this group would also agree to speak with one voice. Annually, FANL, the currently recognized processors' organization engaging in negotiations under the FOS model, has taken the time to engage in collective bargaining with the union at considerable expense; other processors, who were not dues-paying members of FANL, enjoyed the fruits of these labours without assuming the burden of paying for them. While membership in FANL is voluntary, there was little that government could do to assist in fee collection. However, elsewhere in Canada there exists an effective legislative model that makes the dues of an employers' organization under this type of regime debts payable and recoverable through civil action.

Accordingly, I am recommending that government should amend the *Fishing Industry Collective Bargaining Act* to allow for an industry-to-industry collective bargaining regime by processors and harvesters should a preponderance of fish processors support such an approach. To support this, a dues collection regime should be instituted, and unpaid dues to the employers' organization should become debts payable and collectible by civil action. Provided the proposed processors' organization meets certain tests, i.e., having membership equivalent to at least fifty percent of the previous year's finished product weight, and a constitution that provides for a duty of fair representation, a mechanism for internal resolution of disputes, and limits its activities to collective bargaining, the government (i.e., Cabinet) under an amended *Fishing Industry Collective Bargaining Act* would be enabled, by an Order in Council, to constitute a new registered industry association to represent all fish processors in collective bargaining. By law, the new organization would have an enforceable duty to represent all its members fairly and could only engage in collective bargaining or matters related to the enforcement of a collective agreement.

Auctions: The Vardy Task Force recommended that the parties experiment with an electronic auction system, using a hail at sea system in the 3Ps cod fishery. There are three possible answers to the question of why this did not take place: certain processors feared the effect an auction could have on the financing relationships they had with specific harvesters; the inability of the parties to collective bargaining to agree on the terms under which such an auction might be held; and perhaps most significantly, the fact that initially both parties were content with the current model.

Having reviewed the matter with the parties to collective bargaining under the current regime, they and I agree there is merit in exploring the possible benefits of pursuing an auction pilot project on a regional basis and in a fishery, such the west coast lobster fishery. Accordingly, government should amend the *Fishing Industry Collective Bargaining Act* to permit such a pilot project to take place. In a spirit of cooperation, the parties to that fishery should constitute a joint committee to oversee that process.

Bonus Payments: In some sectors, bonuses and extra payments are made in recognition of superior or value-added performance; in the fishing industry they have evolved as a means to secure product supply. The proliferation of bonuses and extra payments over the years has grown to such proportions that it purported to be at the root of the shutdown in the crab industry this summer. Whether this has resulted from an overcapitalized processing sector chasing too little supply or not, the problem is real. Equally real is the fact that there is no pat solution.

Pleas to make bonuses and extra payments illegal fail to consider the onerous and prohibitively expensive policing regime such a move would require. Establishing a fixed price to discourage such payments is already a choice that the parties may make, but have thus far avoided. In any case, I do not believe this would eliminate bonus payments; rather it would drive them further underground and offshore where they could not be policed. This would create greater secrecy and suspicion in the industry and further jeopardize the credibility and transparency of the current collective bargaining process. Only through the negotiation of a more realistic (i.e., higher) price for the species being negotiated will it be possible to deal with such a situation properly. Therefore, it is my position that the solution to greater credibility and transparency and a reduction in the importance and proliferation of bonuses and extra payments may be gained through negotiation of a more realistic price for fish species, with bonus payments being left to reward superior or value-added performance and furthermore, by pursuit of a social compact in the industry, as discussed in a later section of the report.

Fines and Penalties: Because the *Fishing Industry Collective Bargaining Act* has not been comprehensively reformed for over three decades, the fines and penalties contained therein are not reflective of today's realities and so provide little deterrent value against non-compliance. Accordingly, these should be changed to reflect the levels of fines currently included in the *Labour Relations Act*, whose fines were increased through amendments in 2000.

Considering Other Matters

Quality Measures: Improving and maintaining fish quality must be at the heart of what the industry is about if we are to occupy, enhance and maintain our rightful place in world fish markets. All stakeholders in the industry have a collective interest in ensuring this is so.

Since the model's inception there has been a steady improvement in the quality of the fish products landed and processed in this province, as fish harvesters and processors have come to realize that only by maintaining and improving quality can they hope to grow the industry and realize greater economic benefits from it. All parties, fish processors, fish harvesters and government, are to be commended for their collective efforts and success. However, ongoing vigilance in this area is necessary, if we are to continue to succeed.

Accordingly, I am recommending a series of steps to support quality improvements and encourage further work in this area, namely: a review to update the *Fish Inspection Act*; harmonization, to the extent it does not conflict with current or future minimum processing and licencing policy, of the province's fish processing regulations with those of the Canadian Food Inspection Agency; implementation of the quality recommendations of the Vardy Task Force and the Shrimp Panel Report of 2001, also chaired by David Vardy; increased inspections and the adoption of a risk management approach by the Department of Fisheries and Aquaculture; and allowing the Minister of Fisheries and Aquaculture to adopt quality measures agreed upon by harvesters and processors as a result of negotiation or arbitration of a collective agreement.

Grading: Grading is essential to determine the proper price of fish so that the system of collectively bargained prices may continue to have merit and collective agreements may be properly administered and enforced. Nevertheless, there are many who refuse to admit the value of grading to the industry. As for the people who do the job of grading, their independence and qualifications are continually questioned by fish harvesters and fish processors.

Such sentiments undermine the efficacy and effectiveness of this pillar of fisheries related collective agreements. Accordingly, to address this situation a number of legislative and regulatory changes are needed. Fish graders should be licensed under the *Fish Inspection Act*. Related to this, it should be an offence to intimidate or interfere with a fish grader. The *Fish Inspection Act* should also be amended to provide that on the advice of the parties to collective bargaining, the Minister of Fisheries and Aquaculture should adopt in regulation standards for the licensing of fish graders. In addition, a formal dispute resolution mechanism involving the parties in the first instance, and ultimately the Minister, should be instituted to deal with any dispute regarding the activities of a fish grader.

Plant Workers: Insofar as improved labour relations stability between harvesters and processors will improve the industry and therefore improve plant workers' lot, I see a synergy between this group and the parties who are the primary subjects of my review. Plant workers are concerned with obtaining sufficient income from employment, to have a decent standard of living, and sufficient employment opportunities, where the former is not possible, to qualify for employment insurance benefits to supplement their incomes. Indeed this summer, outside this consultation process, plant workers and their representatives held various protests to draw attention to their plight. I, therefore, recommend the industry and government work with federal counterparts to change income support program qualifications, especially as they relate to shortages caused by this year's resource reductions. Furthermore, I believe plant workers' incomes and futures would be improved if government and industry support and adopt the type of social compact I advocate in a later section.

Resource Considerations: Proper management of the fishery resources off our coasts is critical if we are to sustain and rebuild our valuable fisheries resources. Indeed, if the collective bargaining model is to succeed and have purpose and meaning, a true partnership approach to dealing with the resources for which it exists has to be cultivated and maintained. I find that the parties to negotiations must consider the biology of fish and regional differences in biological imperatives and allow these to drive negotiation schedules. I also recommend the industry and provincial government to work with federal counterparts to implement resource management measures agreed to during the collective bargaining process. Furthermore, I find that it would facilitate harvesters' and processors' planning if the provincial government encouraged federal counterparts to release details regarding resource management and allocation earlier, by February, in a given year.

Charting a New Course

Towards a Social Compact: A social compact is an agreement made among parties to create a regime and a code of conduct that will regulate their activities for a specific purpose or to achieve an identified set of goals. In the fishing industry, a social compact should be designed to achieve long and short term labour peace in the fishing industry while growing and promoting the industry so that all may share in and reap the benefits of that growth in a manner that is fair and equitable. Under such a scheme: fish harvesters should receive a fair price for their fish on reasonable conditions; processors should receive a fair return on their investment while being able to focus more on innovative ways of growing and improving the fishery and providing needed and stable employment for fish plant workers on terms that provide them with dignity, a decent, stable income and quality of life in those places in the province where they live and work; and government and the people of this province should enjoy the improved social and economic benefits that an invigorated fishery may bring.

Government has already acknowledged that innovation is needed to bring meaningful change to the province, and has formulated an action plan framework, the Strategic Social Plan (the SSP). According to various commentators, Newfoundland and Labrador's SSP leads the country in assisting in social policy development and incorporating communities' needs in the social and economic programs that affect them. In such an environment, and against such a backdrop then, it is in my opinion not only reasonable, but necessary to recommend a social compact to and for the fishing industry, to focus government's social and economic policy and policy development in this important sector, to take into account the business interests of fish harvesters and fish processors and their representatives in an industry that vitally affects them and all of us and to incorporate stakeholder needs. Such an agreement will strengthen the province's social infrastructure and fabric, help preserve our culture and way of life and impact greatly and positively upon this province's economy.

The foundation of the Social Compact would be the adoption, with fish harvesters', processors' and government's agreement, and implementation of the recommendations contained herein. The cornerstones of that foundation would be the negotiation of a fairer adjusted price-to-market formula (i.e., a higher price) for crab that would reduce the level of bonus payments to those appropriate to reward superior or value added performance, and the institution of a production sharing arrangement, on a pilot project basis, initially for crab, among the province's fish processors, according to seven regions. These production shares would only be transferrable within and between regions, on the approval of the Minister of Fisheries and Aquaculture. Notice of any potential transfer would have to be publicly given by its proponent(s) to all stakeholders, by advertisement. Such production sharing arrangements could satisfy government's public policy objectives of balancing the industry and fostering collaboration by improving processors' abilities to plan in a parallel fashion with harvesters' ability to plan due to their Individual Quotas. They would increase industry value. Levels of employment for plant workers would increase and be more stable and there would be improved regional balance, leading to better protection for communities and businesses that are dependent upon the fishery.

Government's Role: Some people believe the government has no role to play in the fishery of the future. Such suggestions are in my opinion naive and disingenuous and ignore this province's history and present economic and social realities. Government in partnership with industry (and sometimes acting alone in the greater public interest) does have a vital, valuable and pivotal role to play in this key sector of our economy. Government's roles and objectives regarding quality, regional balance in processing, stable labour relations and in creating and supporting a business climate and a proper legal framework in which the industry may grow and prosper are fundamental to the future success of the industry.

Sometimes, in rare instances when the industry is at an impasse, it is government that must lead the way and implement measures that are in the public interest and for the general good of all. At other times, and more commonly, government should adhere to and follow the wise advice of industry players and create and provide the kind of supportive legal and regulatory framework that harvesters and processors require to get on with their business. Other than establishing the framework in which negotiations can occur and binding collective agreements be reached, and providing those facilitation and other services that the parties to negotiations request and that the current and amended final offer selection model provides for, government should not become involved in the parties' negotiations. Therein lies the value of an investigation such as this one.

The parties have the industry and the intelligence to do that which is necessary to ensure the continued growth of the fishing industry in this province and the creation and maintenance of long term labour relations stability. With government's help and the assistance of this report, they can get on with this process.

CHAPTER I

SETTING THE STAGE

INTRODUCTION

For over 500 years the fishing industry has been the backbone of the economy in this province. It is the primary reason the people of this province came and settled here and it is the main reason our ancestors stayed here. Although there have been changes in the fisheries that we pursue and in methods and techniques of fish harvesting and processing over that time, sight cannot and must not be lost of these two facts.

The fishery of today is a vital and key component of the new and evolving economy of this province. Indeed, other than the oil and gas sector of the economy, the fishing industry is the only industry in this province and the only sustainable industry in this province that contributes over one billion dollars annually in revenue to the provincial economy.

Recognition of these facts, and of the vital importance of the role that fish harvesters and processors play in sustaining and growing the provincial economy, is key to understanding the reasons for this study and why achieving labour relations stability in the fishing industry is essential to our well being as a province and a people. The fishing industry is an integral part of the social and economic fabric of this province that defines who we are and who we will become as a people. As such, improving labour relations in the harvesting sector of this industry is a necessary precursor to maximizing the economic and human returns of this resource. Reason and intelligence demand that we not fail in this quest.

In 1998, the Task Force on Crab/Fish Price Settlement Mechanisms concluded that the *Fishing Industry Collective Bargaining Act* was neither a hindrance nor a help to the parties to price negotiations. The members of that Task Force sought to bring stability and structure to price setting in the industry through legislative amendments and a new collective bargaining regime. Through this review of the legislation and that new collective bargaining reality, I hope to strengthen their foundation and build a framework for stability that will withstand the waves of change that are evident in our present and coming in our future.

This report, then, presents an examination of the *Fishing Industry Collective Bargaining Act* and an assessment of relationships in the industry and how these relationships impact upon the success and future viability of this sector of our economy.

BACKGROUND TO THE PRESENT REVIEW

In October 2002, the Fisheries Association of Newfoundland and Labrador (FANL) notified the Government of Newfoundland and Labrador of its intention to discontinue using the interest-based collective bargaining model, known as the 'final offer selection' model. In that communication, FANL cited frustration with the mechanisms available to it for the enforcement of collective agreements and fines and penalties contained in the *Fishing Industry Collective Bargaining Act*.

Under the then current legislation, the consequence of opting out of the final offer selection model was to revert to the traditional model, under which the cessation of business dealings, a strike by fish harvesters or a lockout by fish processors, as a result of failed price negotiations, would be permitted.

Given the importance of labour relations in the fishing industry to the provincial economy, government was not willing to let the model end without the opportunity for further discussion and input from the parties to collective bargaining and industry players generally. Accordingly, in December 2002, the *Act* was amended to require the final offer selection provisions to be used by any parties negotiating collective agreements in 2003. In addition to amending the *Fishing Industry Collective Bargaining Act,* in December 2002, government announced that it would conduct a review of the legislation, including the final offer selection process, in 2003. In late February, 2003 I was approached by government as a person acceptable to the parties to conduct this review. On March 11, 2003, government issued the press release appended as Appendix "A" to this report and appointed me to conduct the promised review.

I was asked to make recommendations on the *Fishing Industry Collective Bargaining Act* and related matters that would: improve the effectiveness of the *Act*; improve the efficacy of the collective bargaining mechanisms commonly referred to as Final Offer Selection; and achieve long-term labour relations stability in the fishing industry. The Statement of Work, which constituted my original Terms of Reference is presented below for purposes of exposition and for the reader's benefit.

Statement of Work

"The consultant will conduct consultations with fish harvesters and processors and their respective organizations in regard to the labour relations environment within the harvesting sector of the fishing industry. The review will specifically encompass the effectiveness of the

*Fishing Industry Collective Bargaining Act (*the *Act)*, including the effectiveness of the final offer selection collective bargaining model as set out in the *Act*.

In completing the work, the consultant will:
1. Develop and employ an appropriate communications plan to ensure stakeholders are given an opportunity to make representation and recommendations;
2. Review the *Fishing Industry Collective Bargaining Act* and provide recommendations regarding its effectiveness in regulating collective bargaining in the fishing industry;
3. Review the effectiveness of the existing legislative provisions of the final offer selection collective bargaining model in the *Act*, with a view to recommending changes, if and as required;
4. Report on any other matters related to the above;
5. Include in the report a list of all persons and groups who made representation (oral or written) during the consultation process;
6. Meet with the Minister of Labour and the Minister of Fisheries and Aquaculture, or their designates, and such other persons as the Ministers may deem appropriate, during the course of the consultation process:
    1. For an initial briefing and discussion of the review;
    2. For a discussion of progress midway through the review period;
    3. For a review of the draft report, prior to submission of the final report;
    4. On such other matters as the Ministers may deem necessary.
7. Submit a report to the Minister of Labour and the Minister of Fisheries and Aquaculture no later than June 20, 2003."

This original mandate was changed and I was given an extended period in which to complete this work. Due to developments in the fishing industry, primarily the announcement by federal Minister of Fisheries and Oceans Robert Thibault of a closure in the northern cod fisheries and reductions in the cod quota for NAFO Region 3Ps, and fallout from the same, and the subsequent but unrelated shutdown of the crab fishery in May and June, it was not possible or even productive to get the parties to negotiation of fish prices or industry players to focus on this study or the reasons for it. The August, 2003 decision by the members of the FANL to wind up its operations also impacted upon this process. Accordingly, the deadline for submission of the report was extended to October 3, 2003.

The Process of Ensuring Input

Early on in my mandate, in March, 2003, I developed and implemented a communications plan to advise interested parties of the scope of the review, to solicit their input, and to ensure that they had the opportunity to participate meaningfully in this process. I resolved and was determined to hold meetings with interested individuals, groups of stakeholders and other interested persons throughout the province and to go wherever people wished to be heard. Towards this end I placed advertisements in Newfoundland and Labrador newspapers in local, regional and general circulation and on radio stations province-wide. To further facilitate participation, an e-mail address, telephone number, fax number, toll-free telephone number and web site were also established.

In addition, letters inviting participation in the review process were sent to: all arbitrators; facilitators; default persons; Regional Economic Development Boards; aboriginal groups; persons engaged in fish grading; fish processors licensed in this province; FANL; the Independent Fish Processors Association of Newfoundland and Labrador; groups representing Cooperative Societies; the Newfoundland and Labrador Federation of Labour; the Newfoundland and Labrador Employers' Council; the Fish, Food and Allied Workers/Canadian Auto Workers Union (FFAW/CAW); and groups representing women's interests. A Discussion Paper was also developed and posted on the web site and made available by fax, photocopy, and mail to hearing participants and other interested persons.

Public and private hearings and meetings were held at St. John's, Petty Harbour-Maddox Cove, Clarenville, Gander, Baie Verte, Channel-Port-Aux-Basques, St. Anthony, Plum Point, L'Anse-au-Loup, L'Anse Au Clair, Mary's Harbour, and Cartwright. Meetings were held in private when the subject matter of those discussions related to commercial information of a private nature that could result in competitive harm to a person or where that person requested a private meeting because they felt more comfortable presenting in that type of venue. Otherwise, meetings were public. Persons who were unable to attend either were accommodated through written submissions, e-mail, or teleconference calls.

Input was also received from FANL and the FFAW/CAW in a series of presentations and meetings leading to a summit held at St. John's between representatives of both these organizations and the Consultant.

In discharge of the Statement of Work, I have met with the Ministers of Labour and Fisheries and Aquaculture, or their designates, on four occasions to discuss my progress and once to review my draft report, prior to its submission in final form.

Over 60 meetings were held with various parties. A complete list of participants and the dates and locations of public meetings is attached as Appendix "B."

CHAPTER II

UNDERSTANDING THE CONTEXT

A HISTORY OF LABOUR RELATIONS IN THE FISHING INDUSTRY

> ***"Those who cannot remember the past are condemned to repeat it."***
> - George Santayana (1863-1952)

To understand where we are headed as a people in the field of labour relations in the fishing industry, it is necessary to understand how we got where we are.

Time was when the Fishing Admirals determined the price of fish and people were not permitted to settle and over winter on the land that is now this province. Fishing rights were highly coveted and the land based fishery was conducted by the great nations of Europe - primarily by Great Britain using indentured crews on most of the island, and on what was the French Shore, by Colonial Governors and merchant entrepreneurs who were given the right to fish there by the King of France.

Over time settlement by Europeans, at first illegal and then legal, was permitted by the colonial powers of the day and the fishery evolved into one dominated by merchants who acted for themselves and for foreign buyers in purchasing fish from outport and St. John's based fish harvesters. This situation continued up until shortly after Confederation with Canada.

Historically in these relationships fish harvesters were price takers and not price makers. Bargaining often involved barter for goods taken up in a merchant's store, with little or no actual money changing hands between harvesters and buyers. In the main, given the methods of fish processing used then, individual shore-based fish harvesters were the processors or makers of cured or pickled fish, which was purchased by merchant buyers at the end of a season. Those harvesters who worked as a collective did so as 'sharemen' working on schooners on the Grand Banks or in the Labrador floater fishery for vessel owners and fish merchants. In neither case were these individuals represented by a union. Indeed, no such concept then existed.

The first furtive attempts at organizing a union in the fishing industry in Newfoundland and Labrador were made by William Coaker and the Fishermen's Protective Union (FPU) at Port Union and environs in 1908. By 1919 the FPU was at its zenith and had some 4421 fishermen shareholder members. Union stores established by the FPU allowed fish harvesters to earn cash for their fish and were an alternative to the credit or "goods for fish" system that then existed (Maritime History Archives, Memorial University of Newfoundland, 2003).

Ultimately, however, as Coaker's personal and political popularity waned so did the fortunes of the FPU. Throughout the 1930's, 1940's and 1950's fish harvesters were largely unrepresented by any union. In the meantime in the 1950's and 1960's the means of fish production began to change as wet or frozen fish production and new product forms began to supplant the traditional forms of salted, pickled or cured fish production (Maritime History Archives, Memorial University of Newfoundland, 2003).

Gradually, the Newfoundland Associated Fish Exporters Limited, which was the sole agency for the export and marketing of Newfoundland Salt Codfish from 1947 to 1970 was replaced in importance by the Fisheries Association of Newfoundland and Labrador Association, whose influence on the industry had been growing over time. With the passage of the federal and provincial *Salt Fish Marketing Acts*, in 1970, the Newfoundland Associated Fish Exporters Limited ceased to exist and was replaced by the Canadian Saltfish Marketing Corporation, which was given a monopoly in that area, including with respect to the setting of price. The Canadian Saltfish Marketing Corporation ceased to exist in 1995 (Maritime History Archives, Memorial University of Newfoundland, 2003).

The Fisheries Association of Newfoundland and Labrador (FANL), formerly known as the Frozen Fish Trades Association Limited, was created in 1944. By 1970 it was recognized by fish harvesters and government as the body representing the interests of the largest and most economically important processing companies involved in the fishing industry for the purposes of negotiations and price setting in the province. Although the membership of that organization has changed over the years and it has recently announced that it will cease to exist by year's end, FANL still represents the preponderance of fish processors by volume and weight of production of the major fish species produced in this province, as it has in all material points in time since the 1960's.

Coincident with the demise of the FPU in the 1950's, the government of the day, led by then Premier Joseph R. Smallwood, created an association called the Newfoundland Federation of Fishermen, a labour organization supported largely by government funds and not members' dues, to represent the interests of fish harvesters on an *ad hoc* basis in negotiations with fish processors. By today's standards, such financial support would disqualify it as a union. Unlike a conventional trade union, however, it did not engage in classical collective bargaining as we know it today and did not contribute significantly to the improvement of the economic lot of fish harvesters and their families.

Indeed, by 1970 when Father Desmond McGrath and Richard Cashin began organizing a union to represent fish harvesters (the forerunner of the FFAW/CAW), their lot was such that the price of codfish, which was then the mainstay of the fishing industry in this province, was 2 ½ cents per pound. At the same time, fish plant workers were excluded by law from the protection of receiving the minimum wage and received less than the provincial minimum wage.

In 1971, in response to intense lobbying on the part of fish harvesters and their representatives and the changing political and social climate in the province, the Smallwood administration passed the *Fishing Industry Collective Bargaining Act*. This *Act*, which has no equivalent in the western world in the fishing industry, gave fish harvesters the legal right to organize themselves into a union for collective bargaining purposes and to cease business dealings with fish processors, that is, to strike if a collective agreement could not be reached on such issues as prices. Likewise, it gave fish processors the right to organize themselves into an association to bargain collectively with fish harvesters over issues affecting their operations, including fish prices, and the right to lock out fish harvesters where a collective agreement was not reached. The *Act* provided for the certification of fish harvesters based on location. It fundamentally altered the law and created an employer-employee relationship between fish harvesters and processors that in the main did not exist in the fishing industry, except in those instances where fish harvesters worked on processor owned vessels.

Introducing this legislation on second reading in the House of Assembly on June 1, 1971, then Premier Smallwood correctly said,

> "...this legislation will mark a new page altogether in the history of the relations between the primary producers and those few people who buy their fish, package it, process it and market it and bring dollars back into the province for it. " (Hansard: June 1, 1971, page 7)

It was and is intended to provide fish harvesters with dignity and a fair price for their product while recognizing market realities and the right and need of fish processors to receive a fair rate of return on their investment and efforts. Without both, the legislation is meaningless and without purpose. Against a backdrop of failure by the Newfoundland Federation of Fisherman to adequately represent the interests of fishermen, there was room for a new union to emerge. After a majority of workers signed union cards at Burgeo, a protracted strike at the Lake fish plant in Burgeo, and with the passage of the *Fishing Industry Collective Bargaining Act*, the union which became known as the Fish, Food and Allied Workers Union was legally recognized for the first time by processors.

Following this, in the early 1970's a three-month strike occurred in this province's fishing industry. When it ended, the Labour Relations Board (the Board) determined that trawlermen working in the offshore fishing industry were employees of processors and not co-adventurers. This job action subsequently led to recognition of the union's right to bargain on behalf of trawlermen with major fish processing companies in this province.

In 1977, FANL recognized the union as the bargaining agent for fish harvesters throughout the province, and negotiated with the union a collective agreement that resulted in what were then considered to be significant increases in fish prices. For example, the price of gillnet cod was increased by 17 per cent, from 15 to 17 ½ cents per pound.

Three years later, in 1980, as a result of changing economic circumstances and difficult market conditions, fish processing companies dropped the price of fish and stopped collecting union dues. This led to selective strikes by the union and a province-wide lockout by processors that lasted for five weeks. A new collective agreement was finally reached and the terms included a resumption in the deduction of union dues.

Between 1972 and 1987, the union became certified to represent fish harvesters in various geographic regions of the province. In all, 38 separate certification orders were issued by the Board prior to 1987.

In 1987, the FFAW ended its affiliation with the UFCW and became affiliated with the Canadian Auto Workers Union (CAW). As a result of this change and various applications made to it, the Board ordered and conducted a vote among the province's fish harvesters to determine which union they wished to represent them. On May 9, 1988, the Board certified the FFAW/CAW to represent all fish harvesters in this province, "excluding Fogo Island and communities north of Makkovik."

As the 1980's began to draw to a close it became evident to fish processors and fish harvesters that groundfish sizes and quantities were in decline. By the early 1990s this led to reductions in quotas, plant closures and unemployment.

The situation grew to crisis proportions in 1992, with the announcement of a groundfish moratorium by then federal Minister of Fisheries and Oceans John Crosbie, renting our social and economic life and calling into question our reason for being in many parts of this province. In the ensuing five years, only the resolve and gritty determination of our people and The Atlantic Groundfish Strategy (the TAGS program) kept this province's fishing industry and rural Newfoundland and Labrador alive, as the industry was rationalized through the forced exit of some fish harvesters and the re-orientation of others to focus their efforts on other fisheries.

At the same time, species which had previously been marginal and of little importance to our fishing industry now began to take on more importance.

Just as seals and humans predate upon cod, cod predate upon juvenile crab and shrimp. So it was and is that a great paradox occurred, which has fundamentally helped to reshape the economics of the fishing industry. Crab and shrimp, always present in our waters to a limited extent, began to proliferate and flourish in the absence, in numbers that historically existed, of one of their main predators, cod. This happened at a time when world demand for crab was particularly strong and world supply, as a result of a cyclical decline in the Alaska crab fishery, was not.

At the same time, the Newfoundland and Labrador fishing industry retooled and expanded to engage in the more lucrative but less labour intensive production of crab legs and sections as opposed to limiting its production efforts to the far less lucrative but more labour intensive in-plant production of extracted crab meat that began in this province in the late 1960s.

These circumstances led to a situation of particularly high demand and high prices for crab in 1995 and 1996, giving crab harvesters and processors new economic life and a reason to be. It also led to a revolution of rising expectations in 1997 on the part of fish harvesters in terms of the price that they expected to fetch for their product as they entered into negotiations with fish processors on price.

As a result of these circumstances, price disputes, leading to strikes and delays in the opening of the crab fishery, occurred in three of the five years before 1998, culminating in the longest delay, three months, at the start of the 1997 crab fishery.

Indeed, the level of acrimony and suspicion among fish harvesters about the amount of profit that they suspected fish processors were obtaining from the sale of crab in international markets, and about the prices reportedly obtained by fish harvesters elsewhere in Atlantic

Canada, was such that it was difficult to see how, in the context of classical collective bargaining, a strike could have been averted in 1997. Couple this with what fish harvesters and their union representatives saw as a low initial offer at the bargaining table by fish processors, while higher prices were being offered to individual fish harvesters, and the ensuing three-month strike that wreaked havoc with the economy and produced great social unrest in this province was the inevitable result.

Only after a series of protracted negotiations in July of 1997, involving fish harvesters, fish processors, their representatives, the then Premier and Minister of Fisheries and Aquaculture, and with a promise on the part of the then Premier to constitute a Task Force to study the causes of that dispute and to recommend measures to avoid such disputes from occurring again, was ratification of a collective agreement finally reached on July 21, 1997. Nearly an entire fishing season had been lost.

What resulted was the Task Force on Fish/Crab Price Settlement Mechanisms in the *Fishing Industry Collective Bargaining Act*, chaired by Mr. David Vardy, and comprising Mr. Joe O'Neill of the Department of Labour, Mr. Brian Delaney, of the Department of Fisheries and Aquaculture, and me, then a lawyer with the provincial Department of Justice. We worked closely with the FFAW/CAW and FANL, toured the province and visited various parts of the world. We strove for consensus in achieving solutions to the problems facing us, but made it clear to the parties that, where consensus was not achieved, we would recommend that which we believed to be in the best interests of the industry and the province. We filed our report in January 1998.

This same consensus building approach, reserving the right to make recommendations to government when agreement does not exist, is the one that I have brought to bear and have taken with the parties to negotiations, the industry and government in this study.

A New Collective Bargaining Model Is Born

In the end, by January, 1998, after the parties studied the Vardy Task Force Report, the industry agreed in principle to adopt a new collective bargaining model. The model was and is predicated on an overriding desire to resolve deadlock and disagreement effectively and expeditiously. Its foundation was and is premised upon a prohibition on strikes and lockouts; a strict negotiation time line, guaranteeing a price to be set no fewer than seven days before the scheduled opening of a fishery; and the use of final offer selection arbitration for dispute resolution. Interest-based negotiations, focussing on mutual gains as opposed to positional adversarial negotiations, were and are facilitated by a person of the parties' choice.

In addition, the parties agreed to establish joint technical committees to evaluate and come to consensus on technical quality related, resource management and other issues affecting a fishery, with negotiations on price and the terms and conditions of a collective agreement to be entered into by the parties in accordance with a schedule of negotiations agreed upon by the parties, but designed to ensure the fisheries open in a timely manner.

The parties also agreed as part of this process that for each fish species being negotiated they would name a mutually acceptable arbitrator-in-waiting, who would be briefed and kept abreast of issues involved in negotiations and of the progress of negotiations. Should he or she be required, the arbitrator would be prepared to hear final offer positions from each of the parties to negotiations, and would render a decision within seven days of such a hearing. The model also provided and provides that if the parties cannot agree on the identity of an arbitrator or a facilitator, then a default person mutually named by them would do so. Failing their agreement on a default person, the Minister of Labour would appoint this person. These dispute resolution mechanisms were designed to assure timely fisheries openings.

The Vardy Task Force proposed, and government and the parties accepted, that the model would be tested as a pilot project for two years, with a further study to be conducted at the end of that period and the parties being given the opportunity to opt out of the same and revert back to the traditional strike/lockout model of collective bargaining. The Task Force recommended the parties to experiment with auctions and implement certain quality-related measures aimed at improving the quality of Newfoundland and Labrador fish products and the economic returns to fish harvesters and processors.

Following endorsement of the proposed model by FANL and a separate province-wide ratification vote by fish harvesters, which they required, to accept the same in February 1998, these measures were implemented by an exchange of letters between the parties, pending the passage of *An Act to Amend the Fishing Industry Collective Bargaining Act*, S.N.L. 1998 c. 11 later that year. The process of negotiating and testing the pilot project then began.

In 1999, Mr. Howard Noseworthy, a former Deputy Minister of Labour, was appointed to conduct a review of the two-year pilot project. Mr. Noseworthy concluded that the new collective bargaining model was successful, and recommended its further extension for successive two-year intervals. He further recommended that the parties to collective bargaining have an opportunity to discontinue the model by opting out during the 23rd and 24th months of any such period. Opting out would trigger reversion to the traditional strike/lockout model of collective bargaining. In the absence of a party opting out, the model would continue for a further two years. Mr. Noseworthy also recommended a one-year cooling off period. He also rejected FANL's suggestion that sanctions be written into the MOU between the parties.

Following the submission of Mr. Noseworthy's report, entitled "An Evaluation of the *Fishing Industry Collective Bargaining Act* Pilot Project", in 2000, government, with the assent of the parties, extended the pilot project and enshrined it in legislation in *An Act to Amend the Fishing Industry Collective Bargaining Act*, S.N.L. 2000 ch.4. Provision was also made in the 2000 amendments for the statutory recognition of a Memorandum of Understanding (MOU) to be agreed by the parties to negotiations, setting out the legal framework within which negotiations would occur.

Since the model's inception in 1998, 56 collective agreements have been reached between the parties to negotiations, the FFAW/CAW and FANL.

Table 1, below, illustrates that 31 of these agreements have been achieved through negotiations; 25 have been achieved through arbitration. As Table 2 shows, in 14 cases arbitrators found in favour of the FFAW/CAW position; in 11 cases they found in favour of the FANL position.

TABLE 1
DISTRIBUTION OF COLLECTIVE AGREEMENTS

Year	Achieved Through Negotiations	Achieved By Arbitration	Total
1998	2	5	7
1999	4	4	8
2000	4	4	8
2001	7	6	13
2002	9	3	12
2003	5	3	8
Total	31	25	56

TABLE 2
DISTRIBUTION OF ARBITRATED PRICE RESULTS

Year	FANL	FFAW/CAW	Total
1998	2	3	5
1999	2	2	4
2000	2	2	4
2001	3	3	6
2002	1	2	3
2003	1	2	3
Total	11	14	25

Details of all arbitration decisions are included in Appendix "C".

THE CASE FOR A SEPARATE LABOUR RELATIONS REGIME

In its 1996 deliberations regarding harmonizing labour relations legislation in the province, the Labour Relations Working Group for the Advisory Council on the Economy (ACE) determined that the *Fishing Industry Collective Bargaining Act* should not form part of a consolidated labour relations statute. The Group considered the *Act* to be a unique piece of legislation regulating a significantly different labour-management relationship than exists in other sectors of the economy. In my opinion, the ACE Group's assessment was accurate.

The *Fishing Industry Collective Bargaining Act* as it exists today is unique. Nowhere else in the world is there a labour relations model similar to that now contained in the *Act*.

In the United States, for example, anti-trust laws prohibit engaging in collective bargaining in the fish harvesting sector and prices are set either by auction or individual contractual relationships between fish harvesters and buyers.

In Iceland, the parties do engage in a form of collective bargaining for the price of fish, although electronic auctions for fish also exist.

In Germany, Portugal, Spain, New Zealand and Japan a variety of display auctions and contractual relationships exist, but none that are subject to collective bargaining like exists here.

In Norway, the price of fish is set by certain fisheries associations representing fish harvesters that have been given the franchise for that species, making the fish harvesters price makers, with fish processors only able to buy at that price. This worked well when the Norwegian government underwrote this system so as to make it economically feasible, but works less well now and has produced difficulties in the industry in the absence of such levels of subsidy. Electronic auctions also exist in Norway.

Elsewhere in Canada, in Nova Scotia an open market system exists for the purchase and sale of fish. In British Columbia, while collective bargaining for fish prices exists, the fact is that the fishing industry in that area has been particularly hard hit by the resource crisis that they face.

The closest thing to the model that exists here is the system in Quebec. There, under the authority of *An act respecting the marketing of agricultural products*, a board called the Régie has been created and given the power to set fish prices in areas and for fish species within that province where a marketing plan meeting the requirements of that legislation is approved by the Régie. In such an instance where the parties are unable to establish a fair price for fish by negotiations they may apply to the Régie which will establish a panel of three persons to hear the matter to determine a fair start-up price for that fishery. Such prices usually involve a price-to-market formula, with an independent auditor called upon to verify the price, which must be paid. Notwithstanding the above, the parties are free to make other arrangements. To date, the Quebec model has been restricted in its operation. Unlike the situation that exists here, the fact is that the price setting mechanisms it provides for have not been brought to bear on all major fisheries there on a province wide basis.

The fact is that we are different in this province. The history of the fishing industry recited earlier in this report and our culture have made us so. For the last 50 years, successive governments in this province have intervened in the fishing industry to try and establish the maximum social and economic good. This has been particularly so since 1970. What elsewhere is treated as a business to business relationship is here treated and legally recognized as an employer-employee relationship.

Unlike other jurisdictions in this country and in the world, entry into the processing sector in this province is based upon a restricted entry licensing system maintained under this province's *Fish Inspection Act* and Fish Inspection Regulations. The result is that certain processors have licences entitling them to process all species of fish, including crab and shrimp, some are entitled to process shrimp but not crab, and others are entitled to process myriad, if not all, groundfish and pelagic species and shellfish other than crab and shrimp. As well, under this *Act* and Regulations, which have been grandfathered in and protected under the Free Trade Agreement, the North America Free Trade Agreement, the Internal Trade Agreement and the General Agreement on Tariffs and Trade, all fish must be subject to certain minimum treatments and processing requirements and outside buyers who do not possess a licence cannot come into this province and purchase fish. The rationale for these measures is two-fold: to ensure the quality of fish exported from this province; and to ensure that the maximum socio-economic benefit is derived for our people and by the industry.

Given the above, one of the reasons for the existence of collective bargaining in the fishing industry in this province is to provide a check and balance to the power that fish processors would otherwise possess because fish harvesters landing their catch in this province by law are precluded from selling their catch to buyers from outside this province.

These policy decisions made on the part of successive provincial governments and changes in resource availability have resulted in two classes of fish processors in this province: the "haves," who have access to and are permitted to process the more lucrative crab; and the "have nots," who wish to but do not have access to a crab processing licence. Couple this with the fact that surplus processing capacity exists in the fishing industry in all processing sectors in this province in the face of dwindling fish stocks and harvest level reductions and the stage is set for significant competition and acrimony among players on the fish processing side of the negotiating table and industry. On the fish harvesting side the parallel to this would be the threat that certain fish harvesters feel to their livelihoods when others, in the face of a static, dwindling or slightly increasing resource are allowed access to a share of a fishery that they have been participating in and prosecuting.

Faced with these realities a number of persons who appeared before me suggested that the solution to the problems that exist in collective bargaining in the fishing industry and in the industry itself was, variously: to repeal the *Fishing Industry Collective Bargaining Act;* to allow the free market to regulate fish prices in this province; to end restricted entry into the fishing industry and allow whomever wishes to have a crab processing licence to have one; and, to end minimum processing requirements for fish and allow outside buyers into the province to compete against local buyers and processors.

With respect, I can only say that in my opinion these options would create a formula for such social disruption, economic upheaval and foment as has seldom been seen here and would be most unwise against a backdrop of a dwindling or static resource base with the overcapacity and overcapitalization that already exists in the fishing industry. As long as government intends to maintain the policy and licensing measures referred to above, I would not be prepared to recommend the repeal of the *Fishing Industry Collective Bargaining Act* or the adoption of the foregoing measures. My mandate, as contained in the Terms of Reference discussed *supra*, was and is to recommend to the government measures that will lead to long term stability, not instability in the fishing industry in this province.

As for the suggestions about changes in the structural make up of the fishing industry in this province and deregulation of the processing sector by eliminating processing requirements or the disestablishment of the restricted entry licensing regime that exists in this province, these are better directed to the Commission chaired by Mr. Eric Dunne, established by the Minister of Fisheries and Aquaculture to look at policy and structural issues related to the fishing industry in this province.

Still another person suggested that what was required before new measures of the sort advocated in this report are implemented was a reference case preferred by Cabinet to this province's Court of Appeal to determine if those provisions of the *Fishing Industry Collective Bargaining Act* creating legal mechanisms for the establishment of a price for a commodity fish are constitutionally within the purview of the province or beyond its powers. For my part, I have caused a review of the relevant sections of this country's *Constitution Act* to be conducted and have concluded that, based on section 92(11) of the *Constitution Act*, which deals with property and civil rights within the province, and section 92(16) of that *Act*, which deals with matters of a local and private nature[1], the making of a law or a series of laws by the province that provide for the establishment of a price and conditions of sale for a commodity, namely fish within this province in the manner that the legislature has done in the

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[1] As interpreted in the leading cases of: Ward v. Canada [2002] SCC 17, Barry's Limited v. Fishermen, Food and Allied Workers 101 D.L.R. (4th) 84 (S.C.C.) on appeal from (1993) 104 Nfld. and P.E.I.R 277 (Nfld. C.A.) on appeal from (1992) 98 Nfld. and P.E.I.R. 249 (Nfld. S.C.T.D.); Canada (Attorney General) v. Alberta (Attorney General) [1916] 1 A.C. 588 (P.C.); British Columbia Packers Ltd. v Canada (Labour relations Board) [1976] 1 F.C. 375 (Fed. C.A.) (appeal to S.C.C. dismissed on other grounds) [1978] 2 S.C.R. 97 (S.C.C.); Montcalm Construction Inc. v. Minimum Wage Commission et al (1978) 25 N.R. 1 (S.C.C.); and Carnation Company Limited v. Quebec Agricultural Marketing Board [1968] S.C.R. 238 (S.C.C.).

Fishing Industry Collective Bargaining Act and in the manner that is proposed in this report, is within the constitutional purview of the province.

If anything, the hearings that I conducted and the submissions that I received only served to highlight and confirm the need for a separate labour relations regime to exist in the fishing industry in this province. Except for those who advocated abandoning the present regime, the tenor of what I heard reflected the need for a more and not a less specialised labour relations regime when dealing with matters related to the fishery.

The current labour relations regime in the fishing industry is really a living tree that was planted in the soil of this province by government and the current parties to collective bargaining in 1997 and is now rooted in our history. Like all living things, for the model to remain vibrant and alive and to function as it was intended, it needs to change. In this manner, long term labour relations stability and economic and social well being will be achieved. Sometimes it will need to be pruned to cut off dead parts that are no longer relevant. Other times it will need to have new parts and concepts grafted on to it to stay relevant and alive and to grow. Only by careful and constant tending by the parties that have planted this tree can it be made to put down deep roots in this province and to survive the storms that lay ahead and grow straight and tall in a manner that does not shelter or favour one side or another and that protects us all. Unless such measures are taken, the trust among the parties, so necessary to sustain and nurture this tree over time, will not exist and it will wither and die.

In a sense then this metaphor is what this report is about; describing and outlining the necessary conditions and trust to see that tree grows on a basis that benefits and favours all of our people and in a manner that produces long-term labour relations stability in the fishing industry.

What follows now, in keeping with my terms of reference, is my assessment of the effectiveness of the current regime, my assessment by topic of what I have heard and of changes to the *Fishing Industry Collective Bargaining Act* and the elements necessary to produce long-term labour relations stability in the fishing industry.

CHAPTER III

CHANGING THE LEGISLATION

ON THE EFFECTIVENESS OF THE LEGISLATION

Just as collective bargaining in the fishing industry is not common, neither is the use of final offer selection arbitration as a dispute resolution mechanism. Final offer selection arbitration is rare because of the high risk associated with it. It forces the two parties to focus their thoughts and their positions because it leaves an arbitrator with no choice but to choose between their final positions. Sight, however, is often lost of the fact that it is the parties to collective bargaining in the fishery, FANL and the FFAW/CAW, that selected this model.

As previously noted, since the inception of this model 56 binding collective agreements have been achieved; 25 by arbitration; and 31 by mutual agreement. Of the 25 arbitrated results, 56 per cent (14 decisions) have favoured the FFAW/CAW's position while 44 per cent (11 decisions) have favoured FANL's position, a fairly balanced result.

Overall, based upon the input which I have received from the parties, all of the major players in the industry, including FANL and the FFAW/CAW, agree that the *Act* and the model have been highly effective in achieving timely openings of the major fisheries. This single improvement has provided great benefits to the province and industry as a whole in that it allows fish harvesters, plant workers and processors to plan for a timely start to our fisheries. It has also enabled the province and the processing industry to be viewed by those with whom we do business as an assured source of supply. Gone are the days that existed before the Vardy Task Force, when, based upon its labour relations history, the province was viewed and becoming viewed by agents for foreign buyers and foreign buyers as an uncertain or last source of supply.

> ***"Fisheries that start on time are more important than price or anything else that is negotiated; everything else is secondary."***
> \- Excerpt from public consultation records

In the world markets of today it must be remembered that certainty of supply and timely supply of ordered goods are critical to cultivating long-term beneficial business relationships and to assuring that the best possible price is received for a product. This benefit alone has enabled processors to achieve the best possible prices that they could, resulting in them being able to offer a better price to fish harvesters and to reap the benefits of the negotiated or arbitrated price-to-market formula that has existed since 1998 in the crab sector.

The FFAW/CAW has endorsed the model's operation, and agreed to constitute bargaining teams with the ability to make binding proposals on behalf of harvesters and to accept the time strictures in the model which ensure that a legal agreement must be in place at least seven days before the opening of a fishery. This means that the delays in fishery openings that would otherwise occur while the union sought ratification on proposed collective agreements do not exist. Given that the different fleet sectors are much more disparate than they were in 1997, this time saver is critical to timely openings.

In my quest to determine the best way to produce labour relations stability in the fishing industry, I examined many different models and listened to many different viewpoints. I considered a range of options from an open market system to marketing boards, from a regulated industry public utilities board approach (in which the profit and loss margins of harvesters and processors would be examined to determine the appropriate price for the sale of fish) to the present system as it is, and with modification.

Some people who appeared before me and who made submissions referred to the *Fishing Industry Collective Bargaining Act* as being old and out-dated because it has not been substantially reformed since its inception in 1971. Others referred to it as being progressive because of the difference it has made to the lives of fish harvesters as a result of the introduction of the interest-based final offer selection collective bargaining model in 1998 and the progress they recited the industry has made since its inception.

In the main, the parties agree that the final offer selection model provided in the *Fishing Industry Collective Bargaining Act* is a highly effective method for resolving disputes and achieving collective agreements and should be retained. The point of departure which many in the industry, including FANL and the FFAW/CAW, have is two-fold:

1. the model produces not a final price, but a minimum price from which separate or other negotiations between individual processors and harvesters begin. Even though the current MOU between the FFAW/CAW and FANL on price negotiations allows it, the parties as yet have not negotiated a fixed price contract; and
2. difficulty exists, particularly on the part of processors, in enforcing the terms of a negotiated or arbitrated collective agreement against FFAW/CAW members and within the processing sector.

Such challenges notwithstanding, I have adopted a Churchillian approach to the matter at hand. Finding no better model than the one that was put before me and no better alternative having been offered to me, given where we are in the industry and its present state of regulation, I, therefore, recommend that the model, with the improvements and modifications that I recommend in this report to address the issues the parties have identified, should be extended for a further two-year period. By doing so I believe that the degree of trust and buy-in necessary to sustain it over time for the benefit of the industry and all of our people may be realized, notwithstanding that conflict exists from time to time between the parties.

RECOMMENDATION #1: Continue using the final offer selection collective bargaining model for another two-year period with the modifications and improvements to it recommended in this report.

"Improvements may be made, but the model must be kept."
"We can never go back to the traditional model."
- Excerpts from public consultation records

To effect major changes, such changes must be acceptable to the parties affected by them. Moreover, they must be well-planned, communicated and implemented in a fully participatory fashion if they are to have credibility and resonance. That is what I have attempted to do in the balance of this report - to set out a road map that the parties and government may follow to effect the changes that will bring long term labour relations stability and peace to the industry.

IMPROVING THE PROCESS

Although the majority of participants in this consultative process agreed that the model should be maintained, many did feel that improvements could be made. Some were vague in their recommendations and some were very specific. I have considered all such suggestions. My conclusions and recommendations are as follows.

The Definition of Fish

During the hearings that I conducted it was quite rightly pointed out to me that the definition of fish contained in the *Fishing Industry Collective Bargaining Act* was ambiguous. The current definition of fish as contained in section 2(k) of the *Act* reads:

> '(k) "fish" does not include cured fish as defined in the *Salt Fish Marketing Act* or the by products of fish curing.'

This definition reflects the fact that when the *Act* was constituted there was a body created by mirror image federal and provincial acts which was given a monopoly over trade in salt fish in this province and the right to establish the price for salt fish and by products and grades for the same. That corporation, the Canadian Saltfish Marketing Corporation, as discussed, no longer exists and both statutes have been repealed. As such, this definition does not reflect the reality of today's industry. So as to eliminate any future ambiguity as to what is covered by the *Act* and what is meant by the definition of fish and to harmonize it with the other statute under which the province regulates the fishing industry, I recommend that the definition of fish contained in the *Fishing Industry Collective Bargaining Act* be amended to read identically with that contained in the *Fish Inspection Act*.

RECOMMENDATION #2: **Amend the definition of fish in the *Fishing Industry Collective Bargaining Act* to mirror that in sub-section 2(d) of the *Fish Inspection Act*, which reads: (d) "fish" includes shellfish and crustaceans, and marine animals, and parts, products or by-products of them.**

Changing the Method of Arbitration

Three main themes arose in the discussion of issues related to arbitration: the apparent reliance by the parties on arbitration as opposed to good faith negotiations; the scope of matters an arbitrator may consider when rendering a decision; and the method of arbitration employed, being a choice between final offer selection and conventional arbitration.

Heavy Reliance

A number of persons who made presentations to me offered the view that compulsory arbitration of collective bargaining disputes can have a chilling effect on the process. They felt that there may be a tendency to avoid serious bargaining when arbitration seems likely, so as not to prejudice a position. Some of them felt that resorting to binding arbitration can also encourage parties to abdicate the responsibility of resolving their differences and to rely on the arbitrator to adjudicate or make decisions that the parties know is in the best interests of the industry but find politically unpalatable. In either case, they offered the view that too much reliance on an outside party may negatively affect the maturation of a collective bargaining relationship.

To this observation, I note that since its inception as a pilot project in 1998, arbitration has been used 25 times in 56 sets of negotiations; 55 per cent of negotiations were settled by the parties themselves. If there is a chilling effect on negotiations, then, that is a small price to pay in an environment characterized by a long, adversarial history, and in which the timely start of fisheries is crucial to the success of so many people.

Scope of Deliberation

At present, under the rules of engagement provided for in the MOU between the parties to negotiations, all that an arbitrator may do is question the parties on their submissions, consider the materials that he or she has been provided, and make a ruling that accepts one of the two final positions before him or her. Some persons were of the view that arbitrators should be free to consider matters outside this scope. While this may prove useful, in the end I must point out that if the parties to collective bargaining in the fishing industry believe an arbitrator should consider matters other than those presently provided for in the MOU, they have the authority to change the same to facilitate this.

Method of Arbitration

Others suggested that an arbitrator should be given the latitude to engage in conventional arbitration and make whatever decision he or she believes to be correct even if it is not in keeping with one or both of the presentations before him or her. The legislation currently makes conventional arbitration available to the parties, upon their mutual agreement to the same; however, the choice is up to the parties, not the arbitrator. I see no reason to imbue an arbitrator with the authority to choose which method he or she may employ. Each type of arbitration presents different challenges for the collective bargaining parties, and so I believe they, alone, should choose the method by which their fate will be decided. Interestingly, in 25 arbitrations, the parties have never chosen conventional arbitration.

Still others have suggested that rules should be set out for arbitrators under the model - a sort of Code of Conduct for arbitrators, if you will. While the parties' MOU annually sets the terms and conditions for arbitration, it does not specify a Code of Conduct under which arbitrators may conduct their business. If the current roster of professional and competent labour relations arbitrators in this province have not seen fit to establish such a code, I do not see it as my mandate to venture into that arena. However, in this report I do advocate establishing opportunities for the industry parties, including arbitrators, to examine each year's activities with a view to learning how to do things better in the next season. This, I believe, would be an appropriate venue to examine the need for or wisdom of an arbitrators' Code of Conduct for the fishing industry.

Although parties have publicly and privately at times expressed disappointment or dissatisfaction with the outcomes of certain arbitrations, this is human nature and in the nature of collective bargaining. No model that is not subsidized can deal with market uncertainty and the downward pressure that declining market prices place on raw material prices. It is human nature for harvesters to resist or resent a reduction in incomes that results from lower market prices occasioned when soft market conditions occur, which processors must deal with and try to factor into their negotiations on price with fish harvesters, if they are to maintain reasonable operating margins. This reality is often beyond the control of fish processors. The equally real result often is friction between parties at the bargaining table. Despite this fact, the model has produced collective agreements in all of our major fisheries over the last six years.

Therefore for the reasons stated, I am not inclined to change the method of arbitration adopted by the parties as the dispute resolution mechanism for this model. It is fundamental to the model's design and supports the time lines in which the parties must negotiate. Because the parties retain the option of conventional or final offer selection arbitration, I see no reason to narrow or enhance the choices.

RECOMMENDATION #3: There should be no change in the manner and method of arbitration used by the parties unless they mutually agree upon such a change, and section 35.7 of the *Act*, which makes provision for such a process, should not be altered.

The Roles of Facilitators and Arbitrators

The roles of facilitators and arbitrators are key to the success of this process. In my opinion the parties have been particularly blessed to have had the assistance of two knowledgeable and dedicated individuals since the model's inception, whom they selected in accordance with the model: Mr. David Vardy, who acted as the first facilitator on crab negotiations in 1998; and Mr. Herb Ebsary, who assisted Mr. Vardy on that first arbitration and who has acted as facilitator to the parties ever since.

From my review of the arbitration decisions that have been filed to date it is also obvious that the parties have chosen and selected a reliable and competent cadre of experienced individuals to act as "arbitrators-in-waiting" and to perform arbitrations under the model. These decisions have greatly enhanced the model's effectiveness and these individuals have all performed their functions admirably.

That notwithstanding, and even though the learning curve experienced by all the parties to collective bargaining, facilitators and arbitrators included, has lessened since 1998, I believe there is opportunity to profit collectively on an ongoing basis from lessons learned by all parties and suggestions they may have for the model's improvement. So far in this process individual facilitators, arbitrators and the parties have not been provided an opportunity to get together to discuss matters of common interest and to share their views and observations about the process. Such opportunities could prove valuable to keep the process fresh and relevant and to deal with problems before they occur or before they become major and take on a life of their own. Underscoring this is the fact that during consultations a number of arbitrators expressed a feeling of working in isolation throughout a fishing season or from season to season.

Accordingly, I recommend an annual meeting at the end of each season in October, involving all of the parties to collective bargaining and all of the arbitrators and facilitators engaged in the process that year. The purposes of such a meeting would be: to review the functioning of the model that year; to identify any issues that have arisen which cause the parties, the arbitrators and the facilitators concern; and to assist the parties and government in addressing problems and designing changes that will enhance or improve collective bargaining in the fishing industry.

A facilitator should be selected and appointed by the parties to act as chairperson and animator for this meeting. The facilitator should record and forward a report summarizing the observations, findings and recommendations of this meeting to the Ministers of Fisheries and Aquaculture and Labour, for any requested action as appropriate.

RECOMMENDATION #4: **Hold an annual meeting involving the parties, and all arbitrators and facilitators for that year, in October, to examine activity throughout the season's collective bargaining to suggest improvements to the model, to posit solutions to challenges identified by the parties and to assist the parties and government in addressing problems and designing changes that will enhance or improve collective bargaining in the fishing industry.**

RECOMMENDATION #5: **A facilitator should be selected by the parties to act as chairperson of this meeting and to record and forward a report summarizing the observations, findings and recommendations of this meeting to the Ministers of Labour and Fisheries and Aquaculture, for any requested action as appropriate.**

Appointment of Facilitator

As stated earlier in this report the role of facilitator is key to the functioning of the price settlement model contained in the *Fishing Industry Collective Bargaining Act*. Without a facilitator the model cannot function properly or indeed at all. Although section 35.3 of the *Act* provides for the appointment of a facilitator, at the mutual consent of the parties, and sub-sections 35.5(1) and (2) provide back-up in the event the parties fail to do so, the timing to invoke the back-up may not be useful to the process. Sub-section 35.5(2) would see a facilitator appointed as few as 15 days before the opening of a fishery. This is not particularly helpful to the process, considering that the facilitator can be an integral component of settling an MOU, which must be filed by December 31st, and settling the schedule of negotiations, which must be filed with the Minister of Labour no later than February 1st in a given year. Accordingly, I recommend that sub-section 35.5(2) should be amended to provide the Minister the authority to appoint a facilitator no later than 15 days before the MOU is required to be filed, rather than 15 days before the opening of a fishery.

RECOMMENDATION #6: **Amend the *Fishing Industry Collective Bargaining Act* to give the Minister of Labour the authority to appoint a facilitator no later than 15 days prior to the filing of an MOU should the parties to negotiations fail to recommend one to the Minister as the *Act* provides.**

The Cost of Arbitrations and Facilitation

Since its inception as a pilot project, government has borne the cost of facilitation and arbitration. The current budget is $200,000. A number of persons suggested that government should stop paying these costs and cease this type of support. Still others suggested that government should continue to pay. It was also pointed out to me that in other sectors of our economy government provides mediation and arbitration services or facilitates them at no cost.

The latter is not quite accurate; the Labour Relations Division of the Department of Labour does provide conciliation and mediation services at no direct cost to the user, but arbitration costs are strictly borne by the parties who use them. Given the importance of this sector to the economy of the province, and in the interest of managing a very public resource and the private and public benefits accruing from it, I am persuaded that we cannot afford to abandon the cost of underwriting these mechanisms. Indeed, if anything, there may be merit in increasing the amounts available for such purpose to ensure appropriate tripartite preventive mediation measures are taken to identify and address issues before a stacking effect occurs and they become major problems. This would appear to me to be a small cost to preserve labour peace.

RECOMMENDATION #7: Government should continue to support the model by paying the cost of the arbitration and facilitation services required to operationalize it.

Re-invigorating Joint Technical Committees

Originally as envisaged in the Vardy Report, joint technical committees representing the parties to negotiations were to be constituted for the purposes of jointly identifying and addressing quality, resource management and other issues of a technical nature related to a given fishery. On a go-forward basis they would also review any problems that had arisen in a past season with a view to proffering solutions.

One of the concerns that I heard expressed by several commentators on the process and the observations that I made myself regarding the current process is that the time period for joint technical committees to do their work in relation to given fisheries where a collective agreement is to be negotiated appears to be too compressed and too proximate to the time when parties must begin negotiating that year's collective agreement. This year, certain technical committees met just one week before or during the week that collective bargaining began.

In my opinion, February or March of a given year is too late for these committees to begin their work. They should do so in October after the meeting of facilitators, arbitrators and the parties has occurred and while issues are still fresh in their mind. This would provide adequate and proper time to deal with technical issues that should be addressed before the start of the next negotiating and fishing season.

RECOMMENDATION #8: Joint technical committees should meet in October immediately after the meeting of facilitators, arbitrators and the parties has occurred, to examine technical issues arising from the past fishing season and to deal with anticipated issues in the upcoming season.

The Collective Agreement

For over a decade, there has existed a master collective agreement to which price and other schedules are appended for each particular species that has been the subject of price negotiations. The current legislation does not differentiate among types of collective agreements and therefore makes no accommodation for the negotiation of a master collective agreement.

RECOMMENDATION #9: Amend the *Fishing Industry Collective Bargaining Act* to recognize that a collective agreement, for the purposes of the *Act*, may comprise a combination of a master collective agreement and a price schedule and other schedules pertaining to a particular species.

The Memorandum of Understanding

The MOU sets the terms of reference for fish price negotiations. Among other things, it includes guidelines for arbitration, terms regarding the role of the arbitrator, and terms regarding the resolution of disputes during the conduct of fisheries. The present provisions of the *Act* require the parties to negotiate a new MOU before December 31st in a given year. Thereafter, it can only be achieved through arbitration.

This was felt by certain of the parties to impose unnecessary restrictions and prescriptiveness on the process and was noted as presenting significant problems to the parties to negotiations last winter when FANL, at least initially, chose not to engage in collective bargaining with the FFAW/CAW. Having reviewed the matter and considered the possibility that an organization like FANL might choose not to engage in collective bargaining in a future year, I believe the only prudent and fair measures to take are to amend the legislation to allow the Minister of Labour, by regulation, to establish a framework for collective bargaining, including guidelines for arbitration and other issues, after December 31st if one of the parties to the previous year's MOU does not re-engage in collective bargaining. Furthermore, the legislation should be amended to create a bridging mechanism to roll over the previous year's MOU where there is no change in collective bargaining parties. These choices would facilitate the achievement of an MOU without the necessity or expense of arbitration.

RECOMMENDATION #10: Amend the *Fishing Industry Collective Bargaining Act* to give the Minister of Labour the right, by regulation, to establish a framework for the terms and conditions of the final offer selection collective bargaining model after

December 31st at the request of a party to negotiations when one of the parties to the previous year's MOU ceases to participate in the process.

RECOMMENDATION #11: Amend the *Fishing Industry Collective Bargaining Act* to create a bridging mechanism similar to that commonly used in collective agreements that would provide that where the parties to the previous year's MOU fail to execute a new MOU for the upcoming year by December 31st, the MOU between the parties for the previous year would automatically roll over.

Scheduling Re-opener Clauses

Re-opener clauses are commonly contained in a variety of the collective agreements arbitrated or negotiated under the *Act*, particularly where there is some event or circumstance beyond the control of the parties which they foresee or anticipate might trigger one or both of them to renegotiate a particular collective agreement or a term of a particular collective agreement on the happening of that event or at a particular point in time. However, at present there is nothing in the *Act* that requires the parties to establish a schedule for arbitrating a re-opener clause or that identifies who will be the arbitrator and facilitator for a re-opener clause negotiation - although practically one would expect it to be the original facilitator and arbitrator. To address this situation I am recommending the following:

RECOMMENDATION #12: Amend the *Fishing Industry Collective Bargaining Act* to require that: 1. the parties to a collective agreement containing a re-opener clause should establish a schedule for any such re-opener clause or clauses and to advise the Minister of Labour of that schedule; 2. The time frame established in a re-opener clause schedule should be such as to ensure that no cessation of business dealings occurs in a fishery during negotiation of a re-opener; 3.The arbitrator and facilitator used during negotiations of a species should be the same for negotiation of a re-opener for that species, unless the parties otherwise mutually agree; and 4. The default person named by the parties or the Minister of Labour under section 35.5 of the *Act* should establish a time frame for negotiations of a re-opener, if the parties fail to do so, but in any event, this time frame should not exceed seven days.

Enforcing Collective Agreements

The enforceability and enforcement of collective agreements was and is a major issue for FANL and its members. Under the *Labour Relations Act*, all parties have the right to appeal to the Board to make a determination regarding the binding effect of a collective agreement. Under the *Fishing Industry Collective Bargaining Act*, this avenue is available only to an accredited processors' organization. The fact is that under the legislation neither FANL, because it is not accredited, nor a single processor has standing before the Board to make a complaint. I agree with the suggestion that these parties should have standing to take this action.

RECOMMENDATION #13: Amend the *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* to provide access to the Board for any party wishing to determine the binding effect of a collective agreement in the fishing industry.

When one of the parties questions the application or interpretation of a collective agreement, or a portion thereof, then the normal labour relations route to redress is the grievance procedure culminating in arbitration. It has been brought to my attention, by the parties in this industry, that the grievance procedure is too time-consuming and potentially too expensive a mechanism.

Subject to meeting the test provided for in section 22 of the *Fishing Industry Collective Bargaining Act* (which appends section 86 of the *Labour Relations Act*) grievance procedures may be as long or as brief as the negotiating parties agree. In the absence of overwhelming evidence that it is dysfunctional in this industry, I am not persuaded to abandon the process.

I am, however, mindful of the time-sensitive nature of this industry, which sets it apart from others for the purposes of labour relations processes. I, therefore, recommend to the parties that they collaborate and simplify their current grievance procedure, if such simplification can be made. To expedite resolution, I also recommend that, at the request of either party to a collective agreement, the Minister of Labour should be allowed to appoint an arbitrator who will resolve the outstanding grievance within seven days of that arbitrator's appointment. To facilitate this and to ensure a panel of arbitrators possessed of the necessary fishing industry expertise, I further recommend that the parties to negotiations should provide the Minister of Labour with a panel of three such arbitrators from which to choose. Should they fail to do so, the default person should be possessed of this authority. The arbitrator's decision should be immediately capable of being filed with the Supreme Court of Newfoundland and Labrador, Trial Division, and enforceable 48 hours after doing so.

Furthermore, any party to a binding collective agreement should be enabled, by the amended legislation, to file a grievance against a rogue party not honouring a collective agreement. This provision should enable a processor or processors' organization to file a grievance against another processor, a fish harvester, or a union bound by a collective agreement, and vice versa.

RECOMMENDATION #14: Amend the *Fishing Industry Collective Bargaining Act* to allow the Minister of Labour, at the request of either party to a collective agreement, to appoint an arbitrator to resolve an outstanding grievance. To ensure arbitrators possessed of the necessary fishing industry expertise, the arbitrator should be chosen from a panel of three arbitrators presented to the Minister of Labour by the parties to negotiations. Should the parties to negotiations fail to name such a panel, the default person should be possessed with that authority. The arbitrator's decision should be rendered within seven days of his or her appointment. Lastly, the arbitrator's decision should be immediately capable of being filed with the Supreme Court of Newfoundland and Labrador, Trial Division, and enforceable 48 hours after doing so. Furthermore, any party to a binding collective agreement should be enabled, by the amended legislation, to file a grievance against a rogue party not honouring a collective agreement. This provision should enable a processor or processors' organization to file a grievance against another processor, a fish harvester, or a union bound by a collective agreement, and vice versa.

The sanctity of legal agreements reached between the parties to collective bargaining should be respected. Valid collective agreements once reached should be enforceable by the parties to them against one another and others bound by them. Towards this end I am recommending that in relation to labour relations matters arising under the *Fishing Industry Collective Bargaining Act* an order or determination of the Board should be immediately capable of being filed by a party to a hearing before that board as a judgment of the Supreme Court of Newfoundland and Labrador, Trial Division and to be enforced 48 hours after such filing, and that government should make the necessary amendments to the *Labour Relations Act* and the *Fishing Industry Collective Bargaining Act* to make this so.

RECOMMENDATION #15: An order or determination of the Board made in respect of a labour relations matter arising under the *Fishing Industry Collective Bargaining Act* should be immediately

capable of being filed by a party to a hearing before that board as a judgment of the Supreme Court of Newfoundland and Labrador, Trial Division and enforceable 48 hours after such filing without any further waiting period, and government should make the necessary amendments to the *Labour Relations Act* and the *Fishing Industry Collective Bargaining Act* to make this so.

In 2001, the *Labour Relations Act* was amended to provide the Board with the authority to declare an unlawful work stoppage and to issue a cease and desist order, which is enforceable as an order of the Supreme Court. No such amendment has been made to the *Fishing Industry Collective Bargaining Act*.

Both *Acts* prohibit a substantially similar group of employer and employee/union labour practices; however, only the *Labour Relations Act* allows a party to complain directly to the Board about such unfair labour practices. Under the *Fishing Industry Collective Bargaining Act*, the Board may hear an allegation only about a failure to negotiate and only if the Minister refers such a complaint to the Board. If harvesters or processors wish to have such a determination made, they must apply to the courts and seek an injunction against the action.

Therefore, sections 18.1, 90, 123 and 124 of the *Labour Relations Act*, which deal with the enforceability of collective agreements and arbitration decisions, unlawful strikes and lockouts and the determination of rights flowing from an unfair labour practice or breach of a collective agreement that is binding on a party should be incorporated by reference and added to the *Fishing Industry Collective Bargaining Act*, subject to the elimination of the 14-day waiting period contained in section 90 of the *Labour Relations Act*, so that a determination would be immediately capable of being filed as a judgment of the Supreme Court of Newfoundland and Labrador, Trial Division. Compliance should be made mandatory 48 hours after such filing.

In addition, the Board should be authorized to issue interim cease and desist orders regarding unlawful strikes and lockouts. These would have the force and effect of a final order on the same issue during the time it takes to properly investigate a complaint.

RECOMMENDATION #16: Sections 18.1, 90, 123 and 124 of the *Labour Relations Act* which deal with the enforceability of collective agreements and arbitration decisions, unlawful strikes and lockouts and the determination of rights flowing from an unfair labour practice or breach of a collective agreement that is binding on a party should be incorporated by reference

and added to the *Fishing Industry Collective Bargaining Act*. Furthermore, eliminate the 14-day waiting period currently contained in section 90, and make a Board order capable of being filed by a party to a hearing as a judgment of the Supreme Court of Newfoundland and Labrador, Trial Division, and enforceable 48 hours after such filing. Lastly, enable the Board to issue interim cease and desist orders regarding unlawful strikes and lockouts.

Furthermore, I agree with many observers that labour relations matters in the fishing industry should be dealt with in an expedited manner and by a panel that is knowledgeable of the same. Therefore, I am recommending that a special panel of the Board, with expertise in fishery and labour relations issues, be established to deal with any and all labour relations matters where the Board is called upon to make a decision relative to the *Fishing Industry Collective Bargaining Act*.

RECOMMENDATION #17: Government should establish a special panel of the Board with expertise in fishery and labour relations issues to deal with any and all labour relations matters where the Board is called upon to make a decision relative to the *Fishing Industry Collective Bargaining Act*.

Arbitration arising from a grievance regarding a provision in a collective agreement is known as 'rights arbitration.' These decisions are enforceable as orders of the court, as they are judgments about the collective agreement arising from the collective agreement itself. In December 2002, the *Fishing Industry Collective Bargaining Act* was amended to provide for court enforcement of decisions made through rights arbitration, the same as exists in section 90 of the *Labour Relations Act*.

Arbitration that sets the provisions of the collective agreement or a portion thereof, as in the price for a fish species, is known as 'interest arbitration.' Some parties would have me equate these decisions with rights arbitration decisions, and make them enforceable in a court of law.

Nowhere else in labour relations is a collective agreement or a provision of one enforceable on its own merit; all such questions must be taken through the grievance and rights arbitration process regulated by legislation. To allow the enforcement of a provision of a fishing industry collective agreement outside the normal process would be to hold the industry to an impossible standard. Notwithstanding this theoretical rationale, it would be unproductive of me or government to require the enforcement as the maximum price of what is currently a minimum price in a commodities market. Should a fixed price ever be negotiated, I believe it would be equally impossible for government to enforce the same in an environment characterized by processors and harvesters focused on maximizing their economic returns. I, therefore, make no such recommendation.

Accreditation of a Processors' Organization

Many feel that the lack of an accredited processors' organization to represent the entire industry in collective bargaining is at the root of the instability they believe exists in collective bargaining in the fishing industry. The subject of accreditation has been one of the hottest and most debated topics related to the *Fishing Industry Collective Bargaining Act* in recent years.

> ***"Lack of accreditation in a processors' group is a problem, as the union is certified."***
> - Excerpt from public consultation records

FANL has twice applied for accreditation under the *Fishing Industry Collective Bargaining Act* since the inception of the final offer selection model in 1998. In 2001 it applied for accreditation for shrimp bargaining alone, but was turned down by the Board which found that under the *Act* a processors' organization could not apply for accreditation on the basis of a single species. The Board found that to be accredited an organization must apply on the basis of all species and meet the tests set out in sections 13.1, 13.2 and 13.4 of the *Act*. In particular it must: represent and have as its members those fish processors that produced the majority percentage of fish by finished product weight based on the previous calendar year's production; be prepared to offer membership to new members on terms no less favourable than those offered to its existing members; and not deny membership to a processor except for failure to pay the periodic dues, assessment and initiation fees ordinarily required to be paid by its members to gain membership.

FANL again tried in May 2002 to seek accreditation, this time for all species. According to its presentation to me, "FANL filed an application for accreditation on all species under the *Fishing Industry Collective Bargaining Act* Expedited Accreditation Process." Towards that end FANL "changed its own by-laws to put in place governance structures and mechanisms required for accreditation, with the expectation of a three to four month turnaround." FANL stated that it "needed accreditation so that it could enforce any provisions of the Collective Agreement including fixed price, which may have been achieved through negotiation/arbitration." However, "[i]nterventions on [its] accreditation application were accepted by the Board from the Fogo Co-operative Society, the Labrador Fishermen's Union

Shrimp Company, from small processors and the FFAW/CAW, following expiration of the deadline for submissions. As a result of pressure, the Board decided to hold extensive hearings on accreditation, which were originally scheduled for Fall 2002. In the interim, the Board's Chairperson resigned, and the consultations were rescheduled to December 2002 and March 2003."

FANL withdrew its application for accreditation in December, 2002, when it became clear that the Board would not provide an expedited process. Because it would not be accredited by December 31, which was the deadline to withdraw its intention to opt out of the model, FANL proceeded with its declared intention and, indeed, withdrew.

Once before in the history of the *Fishing Industry Collective Bargaining Act* did FANL attempt to become accredited. In 1991, with the support of the FFAW/CAW, FANL began a quest to have itself written into the legislation as the accredited bargaining agent for all processors in the province. That attempt made it so far as the floor of the House of Assembly where a draft bill to that effect was to be introduced and withdrawn from the order paper because of opposition to it from a number of then non-FANL processors.

From the hearings that I have held and the submissions I have received it is obvious to me that there is much suspicion by non-FANL processors and fish harvesters of FANL's motives for seeking accreditation. Similarly, it is evident to me that there was and is much misunderstanding of what accreditation means and what would be achieved by accreditation of a processors' organization under the *Act*.

Simply put, under the *Act,* accreditation of a processors' organization is the parallel to certification of a bargaining agent for fish harvesters. All that it would give the accredited processors' organization is the right to enter into collective bargaining on behalf of all processors with the certified bargaining agent for fish harvesters. It would also provide standing in a similar manner that the *Act* now gives the union to enforce compliance with a binding collective agreement. It does not create a closed shop in the sense that an accredited processors' organization could refuse membership to a processor who wished to join it, neither does it impose a requirement on all processors bound by resulting collective agreements to join the accredited body.

One of the benefits of accreditation, like certification of a labour union under the *Act*, is that once achieved, an attempt to raid the members of the accredited organization by another organization and deprive it of its status may occur only every two years between September and October 31.

Some in the industry support the concept of accreditation of a processors' organization on a per species basis. A number of persons also felt that the threshold for accreditation should be raised from 50 per cent to 75 per cent of the previous year's finished product weight. The fear was of some group such as FANL somehow seizing control of the industry. Still others suggested that FANL, given its present membership, should be written in as the accredited representative of fish processors.

As for the suggestion that a number of parties have made for the *Act* to be amended to permit an organization and, presumably by logical extension, different organizations to be accredited as the bargaining agent for different species on a per species basis, there are opposite and contending views on this subject which were expressed to me by various of the parties making submissions. In reaching my determination on this subject I considered all these viewpoints. In my opinion symmetry is important here. Just as there is only one certified bargaining agent for fish harvesters for all species of fish, so in my opinion should there only be one accredited bargaining agent for all fish processors. Accordingly, I recommend that the *Fishing Industry Collective Bargaining Act* not be amended to permit the accreditation of a fish processors' organization on a single species basis.

Furthermore for the same reasons of symmetry, I am not prepared to recommend that the threshold level for accreditation contained in section 13.1 of the *Act* be changed from 50 per cent of the previous calendar year's finished product weight to a higher percentage.

If FANL or any other organization achieves accreditation, then in my opinion it should be entitled to a period of labour relations stability where it doesn't have to worry about having its members raided by a competing organization. The same is true of the FFAW/CAW which is already the certified bargaining agent for fish harvesters. Such stability in my opinion is necessary for the *Act* and the model to work. Accordingly, I recommend that section 13.7 of the *Fishing Industry Collective Bargaining Act* be amended to only permit raiding of a certified bargaining agent or an accredited processors' organization during the same time period that I have proposed for electing to opt out of the model, namely November 1 through December 31 of the second year of the two year cycle.

On balance, I am not convinced that government should write FANL, or any other organization, into the legislation as the organization that represents this province's fish processors. Equity is equality. Just as the union had to meet a number of tests under the *Act* before it achieved the status of certified bargaining agent for fish harvesters, so should any organization that wishes to represent processors. With vigilance and perseverance I have no doubt an organization of processors can achieve such status, provided it has the necessary numbers to do so and meets the tests set out in the *Act*.

RECOMMENDATION #18: The *Fishing Industry Collective Bargaining Act* should not be amended to permit the accreditation of a fish processors' organization on a single species basis.

RECOMMENDATION #19: Section 13.7 of the *Fishing Industry Collective Bargaining Act* should be amended to only permit raiding of a certified bargaining agent or an accredited processors' organization during the same time period that I have proposed for electing to opt out of the model, namely November 1 through December 31 of the second year of a two year cycle.

RECOMMENDATION #20: If it wishes to be accredited as a processors' organization FANL or any other organization should have to meet legal tests as set out in the *Fishing Industry Collective Bargaining Act* as the union did to the satisfaction of the Board. Neither FANL nor any other organization should be written into the legislation as an accredited processors' organization.

In the Absence of an Accredited Processors' Organization

The concept of accreditation of a processors' organization did not exist in the *Fishing Industry Collective Bargaining Act* prior to the inception of the 1998 pilot project. The concept of *de facto* accreditation was likewise first introduced at that time, through section 35.9 of the *Act*, which provides that in the absence of an accredited processors' organization, a collective agreement entered into between harvesters and a group of processors shall be binding on all processors who process a species, if that group processed the majority percentage of fish by finished product weight based upon the previous calendar year's production of that fish species.

Without this section, and in the absence of an accredited processors' organization, such agreements would not be legally binding on all processors of a species. This clause was crafted by the drafters of the Vardy Task Force Report quite carefully and with much deliberation. Without it the model could not have had the impact it has had as convention and voluntary acceptance of a collective agreement, and not the force of law, would have been the only determinants of whether a collective agreement, recognized by the industry as a whole, existed.

The 50 per cent or majority of finished product by species threshold in section 35.9 is consistent with the threshold for total accreditation, discussed in the previous section. The *Act* facilitates the binding effect of a collective agreement on a per species basis, not to give FANL the franchise to negotiate for all fish processors forever and a day, but to take into account the fact that there might be different groupings of processors or organizations engaged in negotiations with fish processors, or the same grouping, as has turned out to be the case with FANL. It was also put in place as a bridging mechanism to allow the original pilot project to get off the ground and achieve binding collective agreements on the industry before FANL or any other processors' organization could apply for accreditation. Nothing precludes fish processors organizing themselves however they wish to avail of this section. In this sense it is neutral, although in all candour the principal party representing processors thus far in per species negotiations has been FANL.

A number of persons who made submissions to me suggested that in the absence of accreditation, the threshold level for recognition of an agreement as binding should be changed to 75 per cent of fish by finished product weight, instead of the 50 per cent threshold level. If this were so, in all candour, few collective agreements binding on the industry would have been reached under the model. This would have done much to rob the model of its efficacy. Allowing such a situation to enure could lead to a patchwork quilt of collective agreements for a single species, producing confusion in the industry. In my opinion, such a change is not now warranted and would do nothing to strengthen the efficacy or working of the model, but much to undermine it.

Accordingly, I recommend that there be no change in the threshold level provided for in sub-section 35.9(b) of the *Fishing Industry Collective Bargaining Act,* required to make a collective agreement entered into by a processors' organization or grouping of processors representing a majority of fish by finished product weight of that species, binding on all of the processors of that species in the province.

RECOMMENDATION #21: There should be no change in the threshold production level required to make a collective agreement binding on all processors of a species.

FANL chose to opt out of this model late last year, but wisely, I believe, and to the good of the industry, chose to re-engage in collective bargaining earlier this year. As of August, 2003, FANL has announced it will disband after five decades of representing processors in price negotiations and labour relations matters. Unless FANL is replaced by another organization representing fish processors, negotiations will become more difficult and fractured. Either the industry will engage in pattern bargaining on a per species basis or a multiplicity of collective agreements will have to be negotiated each year between the union and individual fish processors. While the final offer selection model can function in such a world and will produce collective agreements that are binding on the parties to those negotiations, it will not function at its optimum level as it was originally intended. Furthermore, it will become much more difficult for government and the process to distill, as a result of the collective bargaining process, the kinds of quality, grading and resource management measures that would otherwise flow from the model.

So as to achieve symmetry which does not now exist, I recommend that section 35.2 of the *Act* be amended to permit a group of processors or a processors' organization representing a majority of the finished product weight of a given fish species based on the previous calendar year's production to give notice of intent to engage in collective bargaining for a given species to a bargaining agent representing fish harvesters.

RECOMMENDATION #22: Amend the *Fishing Industry Collective Bargaining Act* to permit a group of processors, or a processors' organization representing a majority of the finished product weight of a given fish species based on the previous calendar year's production, to give notice of intent to engage in collective bargaining for a given species to a bargaining agent representing the harvesters.

Opting Out of the Model

At present the *Fishing Industry Collective Bargaining Act* affords the parties to collective bargaining a two-month window of opportunity in which either may signal its intention to discontinue using the model. The result will be a return to a traditional collective bargaining regime, under which strikes and lockouts would be permitted. This provision was included at the specific request of the two parties to collective bargaining.

The FFAW/CAW, as a labour organization, could not give up its right to strike in perpetuity and FANL supported the opting out provision as a reasonable mechanism to exit should they not wish to carry on with the model. It was for these reasons that the original pilot project contained a sunset clause necessitating my predecessor Howard Noseworthy's review of the pilot project and the parties' buy-in to its continuation.

As a result, the *Act* provides that commencing September 1, 2002, and every two years thereafter, a party may, between September 1 and October 31, signal its intent to opt out of the model. If a letter of intent is not revoked by December 31 of the same year, the legislation regulating the model becomes inoperative. After FANL filed its letter of intent to withdraw from the model, in October, 2002, the legislature passed *An Act to Amend the Fishing Industry Collective Bargaining Act*, S.N.L. 2002 ch. 20. The opportunity to opt out was moved to September 1 through October 31, 2003. This, in effect, revoked FANL's letter of intent to withdraw from the model and extended the model for the 2003 fishing season.

At the time the original opting out provision was created, it was envisaged that four months (September 1 through December 31) would be sufficient to make the policy or legislative changes to the *Fishing Industry Collective Bargaining Act*, the model, or other legislation necessary to address the reasons for opting out and the consequences of such action. In the Fall of 2002, it became clear that this time frame was inadequate for such an undertaking.

With world markets closely monitoring the province's industry and the outcome of fish price negotiations for the 2003 fisheries and the potential adverse effect that a protracted fish price dispute could have on the industry and the province, government made the decision that it did to extend the model's life legislatively and to pursue this study. If anything, subsequent events in the fishing industry in the past eight months have proved it necessary to have more time to deal with such important issues properly. These events include the announcement, this spring, of certain fishery closures by federal Fisheries and Ocean's Minister Robert Thibault, and the responses to it, the effect of this year's quota cuts on the fishing industry, that led to the newly-commissioned study of structural issues in the fishing indsutry, the lockout that occurred in the crab sector and FANL's decision to disband.

Even were the model to cease to operate, absenting all party and government consent, I do not believe that four months is sufficient time to transition to the new realities that would then exist in our economy. Neither did Howard Noseworthy, in his 1999 evaluation of the Final Offer Selection pilot project. Mr. Noseworthy recommended adding a one-year cooling off period after opting out to afford the parties the opportunity to transition to the new collective bargaining reality that would exist upon the expiration of the model.

Across the country, labour relations legislation requires parties to enter into a cooling-off period before economic sanctions are brought to bear against each other. Such periods generally do not exceed two weeks, or 14 days. In cases of ongoing negotiations confined to a single or finite work site, a 14-day cooling off period may be reasonable: it provides sufficient time for cooler heads to prevail, if, indeed, a solution exists.

The reality of the current legislation is that at most it affords the other party and government four months' notice of that party's intention to opt out. If not communicated until October 31, it could afford as little as two months' notice, subject to the caveat that the opting out becomes reality if a party does not withdraw its intention by December 31.

Even if the parties attempt to use this time to address the issue at hand, the fact is that this period does not offer sufficient time to deal with the kinds of complex issues and interrelationships that characterize the fishing industry. The real consequence of this under the legislation then would be that the parties must revert to the traditional collective bargaining model for the next fishing season.

The traditional model is predicated upon the use of economic sanction, that in three of the five years prior to 1998 resulted in strikes and delayed fishery openings, with fish being harvested at the wrong time to maximize its quality. This had deleterious effects on fish prices and the livelihoods of harvesters, plant workers and processors. Fish quality suffered, as did the reputation of the province's fishing industry.

Equally clear is that the notice of opting out period currently provided is insufficient to allow another party or parties who might wish to occupy the field that FANL had previously occupied. It is an especially short time frame given that the parties to negotiations are required by the *Act* to have negotiated and filed a Memorandum of Understanding by December 31 of that year, and a schedule of negotiations by February 1 of the next year with the Minister of Labour.

The above is not fantasy, but fact as the series of negotiations that took place between the FFAW/CAW and various fish processors, and the confusion in the industry it produced, proved, earlier this year. FANL's sage decision to re-engage in collective bargaining with the FFAW/CAW in February 2003 restored order to the proceedings.

Given the importance of this fishery to this province, the industry as a whole cannot be put in such a position again. It is for the foregoing reasons that I recommend that the *Fishing*

Industry Collective Bargaining Act be amended and that the opting out period contained in section 35.12 be changed to November 1 through December 31 of each second year, to be followed by a one-year cooling off period in which problems with the fishing industry and the model may be addressed, relations may be strengthened and amendments or changes to government policy or legislation may be made, before a party may opt out of the model. Should unanimous government and stakeholder agreement exist to end the model, the cooling off period may be waived. Restricting the opting out window to this time frame also accommodates the aforementioned annual meeting of collective bargaining participants, at which proceedings an action such as opting out should be avoided.

RECOMMENDATION #23: Revise the opting out provision to enable this action to occur from November 1 through December 31 of the second calendar year of each two-year rotation.

RECOMMENDATION #24: Institute a one-year cooling off period after opting out, to provide sufficient time to repair relationships, address issues with the model, and amend the legislation, as may be necessary, unless unanimous government and party consent exists to its sooner ending.

INDUSTRY-TO-INDUSTRY COLLECTIVE BARGAINING

Thus far, FANL has twice sought legal accreditation as a processors' organization under the *Fishing Industry Collective Bargaining Act*. Although the union speaks with one voice and acts with one purpose in collective bargaining, the fish processing sector of the industry does not. While FANL speaks for and represents a large number of significant players in the industry, its membership varies from time to time. Furthermore, there is no assurance that it will continue to exist or continue to engage in collective bargaining over time. Indeed, the opposite would now appear to be the case.

Without casting any aspersions on FANL and its members I can only state that I have found that a great deal of hostility and suspicion exists on the part of non-FANL processors, particularly small processors, towards FANL, regarding its motives and reason for being. This suspicion was evident in the level of interventions opposing FANL's 2002 attempt before the Board to achieve status as an accredited processors' organization representing the industry. Some say that FANL's purpose was to control the industry and drive small processors out. Others on the harvesting side have linked FANL's quest for accreditation with an attempt to impose a degree of regulation on the industry that would see measures such as plant quotas introduced so as to ratchet down competition among fish processors and to limit or reduce the amounts of payments for fish to fish harvesters.

In addition, I am aware from media reports I heard before I began this study that allegations of anti-competitive practices or activities in the fishing industry have given rise to an investigation of certain activities in the fishing industry by the federal Competition Bureau.

A number of people suggested to me that it was time for a new beginning in the fishing industry and that what was needed was the creation of a new entity that could speak for the whole processing sector in collective bargaining. Others, including FANL and non-FANL processors, indicated to me that they would be prepared to be part of such an entity in collective bargaining with the FFAW/CAW.

It is this thinking that has caused me to consider the concept of industry-to-industry bargaining and its applicability to the fishing industry.

Industry-to-industry collective bargaining is a labour relations concept which facilitates collective bargaining between an organization of employers and a council of unions representing these employers' unionized workforces. Industry-to-industry bargaining in this country is most common in the construction sector of our economy and in sectors where special resource development related projects of large size and importance exist. Each bargaining entity also has to have a constitution which meets the requirements of the legislation establishing it, including a ratification procedure.

In Newfoundland and Labrador, industry-to-industry bargaining exists and is provided for in the construction trades sector and in the special projects field under the auspices of sections 54-68 and section 70 of the *Labour Relations Act*, respectively. At the present time, there is no provision for industry-to-industry bargaining in the *Fishing Industry Collective Bargaining Act*.

In my quest for new and innovative solutions to the problems facing the fishing industry I decided to pursue the study of this matter further. Here's what I found. For industry-to-industry bargaining to occur there must be enabling legislation to facilitate it. Such legislation exists in this province, which with the appropriate modifications could be made to apply to the fishing industry. Secondly, there must be a willingness or the ability on the part of the parties to negotiations to engage in industry-to-industry bargaining. In the case of the FFAW/CAW, that ability virtually exists since the FFAW/CAW is the certified bargaining agent for fish harvesters in this province, except those north of Makkovik and those on Fogo Island. On the processing side, FANL has sought for years to be the certified bargaining agent for fish processors and been recognized *de facto* as the largest single processors' organization as such for many years. Were industry-to-industry collective bargaining to be imposed on the fishing industry, all processors, including those currently members of FANL, would be required to band together to form the employer organization; FANL, as an organization, could not be part of the same.

Assuming that the legislative framework enabling a new industry association to be created to represent all fish processors is created, then that entity, like the union, would have to have a constitution that meets the requirements of the new enabling legislation. In my opinion it is necessary that any organization which purports to represent the interests of its members, and whose collective bargaining activity may affect the public interest, should be bound by mandatory criteria which will facilitate its effective and cohesive operation. This is especially true in the fishing industry.

Sections 58 through 68 of the *Labour Relations Act* regulate accreditation of an employers' organization in the construction industry by sector of the industry and by geographic region. These sections contain nothing specific regarding constitutional elements, with the exception of paragraph 60(1)(b), which requires members to have vested appropriate authority in the organization; however, sections 70.1 - 70.18 of the same *Act,* which deal with multi-trade bargaining in the construction sector and are not yet in effect, do provide a listing of required constitutional elements.

Paragraph 70(2)(b) of the *Labour Relations Act* provides the Lieutenant Governor-in-Council authority to prescribe an employers' organization for a Special Project. In addition, the legislation provides direction regarding the constitutional elements required by organizations engaged in collective bargaining on a Special Project. In his January 2001 report to government, regarding labour relations on major construction and fabrication projects, Mr. Morgan Cooper recommended amendments to the industry-to-industry collective bargaining model required under the Special Project Order legislation. He recommended, and government enshrined in the *Labour Relations Act*, specific elements that an employers' organization should include in its constitutions:

> " 70(9) An employers" organization that may be prescribed under paragraph (2)(b) shall have a constitution that includes all of the following
> (1) provisions vesting the employers' organization with the exclusive authority to negotiate, enter into and administer collective agreements;
> (2) provisions for the election or appointment of officers of the employers' organization;
> (3) a formula for reaching decisions of the employers' organization that assures a deadlock cannot occur; and
> (4) a formula for the ratification by the employers represented by the employers' organization of collective agreements reached between the organization and a trade union or council of trade unions prescribed as a party to collective bargaining on a special project, and a time limit within which ratification shall take place."

Sub-section 70(10) requires substantially the same elements for the constitution of a council of unions. However, because the fish harvesters' union no longer has the need to ratify collective agreements, due to the prohibition on strikes and lockouts contained in the final offer selection model, it would not be necessary to include a ratification element in the constitution of an organization of processors.

In the construction trades, which are subject to industry-to-industry bargaining, the propensity for certain employers to operate non-union companies undermines the strength and value of the Construction Labour Relations Association of Newfoundland and Labrador, Inc. (CLRA) as a representative organization for the purposes of collective bargaining and setting the labour price for an industry.

This is a condition that is less likely to affect the fishing industry, as the FFAW/CAW represents all fish harvesters in the province, north to Makkovik, except the Fogo Island fish harvesters. Regardless of the unionized status of fish plant operators, most, if not all, licensed fish processors in the province purchase fish from unionized harvesters. Therefore, it is clear that enabling all processors to form one organization for the purposes of collective bargaining with the fish harvester's union will help bring symmetry and balance to labour relations bargaining in this sector.

One of the great concerns that I have heard expressed by FANL and its members over the years and in my present hearings is what I would dub the 'free rider' effect. Both FANL and its members take the time and effort to engage in collective bargaining with the union each year at considerable expense while others, who are not members of FANL, enjoy the benefits of those negotiations without having to assume the burden of paying their fair share for them.

Unlike statutes elsewhere dealing with such matters, this province's *Labour Relations Act* does not include a provision providing for the collection and use of fees from the members of an employers' organization in any industry. Here that is left to the constitution of the organization concerned.

The province of Alberta, on the other hand, does make such provision in its labour relations statutes. The Alberta *Labour Relations Code*, Part 3, Division 2, regulates registered employers' organizations in the construction industry. It includes a provision, section 165, regulating the collection of dues and providing for the collection of unpaid dues, which reads as follows:

> "165. Collection of dues
> (1) A registered employers' organization may require an employer who is bound by a collective agreement entered into by the registered employers' organization or on whose behalf the registered employers' organization bargains collectively to pay dues to the registered employers' organization if the dues
> (a) are uniformly required to be paid by all members to the registered employers' organization, and
> (b) are reasonably related to the services performed by the registered employers' organization in respect of its duties under this *Act*.
> (2) If an employer fails to pay the dues required under subsection (1), the dues are a debt payable by the employer to the registered employers' organization and may be collected by civil action.
> (3) This section does not restrict the ability of a registered employers' organization to establish and collect dues from its members in addition to the dues referred to in subsection (1)."

Accordingly, the constitution of the Alberta Construction Labour Relations Association contains provisions prescribing the Association's right to set and collect fees, and a provision identifying past-due payment of fees as a 'debt due and owing...and recoverable as such.'

Importing such a provision into Newfoundland and Labrador law in the context of establishing the necessary preconditions to the establishment of an employers' association in the fishing industry holds a certain attraction for me. However, any importation of this provision of Alberta law into Newfoundland and Labrador law should contain separate provisions that make it clear:

1. that the mandate of the employers' association only extends to matters related to the negotiation or enforcement of collective agreements and that fees are only chargeable to members in respect of such purposes;
2. that the employers' association is required to provide a schedule of all such fees and an accounting, showing that they only relate to expenses regarding the

negotiation or enforcement of a collective agreement, to its members and the Minister of Labour;

3. that the association is required to provide the Minister of Labour with a list of those who fail to pay any properly assessed fee 30 days after they become delinquent;
4. that the Minister of Labour is enabled to issue a certificate which the association may file with the Supreme Court of Newfoundland and Labrador, Trial Division as a judgment, register with the Sheriff's Office as such under the *Judgment Enforcement Act*, and collect on the same; and
5. that fees based on per species negotiation are payable by all members who are licensed to process that species.

One of the great fears expressed to me was that FANL, if accredited as a processors' organization, would not fairly represent all processors. Notwithstanding that the recommendation of a mandatory processors' organization is predicated on its sole purpose of collective bargaining, it may be possible that a few could attempt to monopolize the majority. To deal with such a concern in the context of a new industry association and the fear that an employers' organization in the fishing industry could be monopolized by a few large processor members, to the detriment or ultimate demise of smaller processors, I would recommend adoption of the approach taken to this issue in New Brunswick.

Section 51 of New Brunswick's *Industrial Relations Act* regarding employers' organizations in the construction industry sets out a viable means by which the activities of a mandatory processors' organization could be held to a standard that would preclude monopoly activity. It reads as follows:

> "51. Duties of employers' organizations
> (1) An accredited employers' organization, so long as it continues to be entitled to represent employers in a unit of employers, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the unit, whether members of the accredited employers' organization or not.
>
> (2) An application by an employer for membership in an accredited employers' organization shall not be affected by any terms or conditions not applicable to other members and membership shall not be denied or terminated except for cause which, in the opinion of the Board, is fair and reasonable."

This is the statutory equivalent of the duty of fair representation under which unions across this country must conduct their business. Currently, the *Fishing Industry Collective Bargaining*

Act does not include a similar provision binding the union representing fish harvesters in the province. Such a provision should be inserted in the *Fishing Industry Collective Bargaining Act*.

If a provision were created to bind a mandatory processors' organization and the union to a duty of fair representation, the need would also exist to amend the *Fishing Industry Collective Bargaining Act* to provide members of the union and an employers' association access to the Board in a case where there was an allegation by a member of one of these organizations of a breach by that organization of a duty to represent that member fairly.

Some concern was expressed to me about whether or not collective actions on the part of fish processors with respect to the price and the conditions of supply of fish by fish harvesters to fish processors could be construed as violating or running afoul of the provisions of the federal *Competition Act*. As long as the collective action of fish processors or an industry organization representing them relate to collective bargaining activities, and the negotiation or enforcement of a valid collective agreement, they would not run afoul of the *Competition Act*, as is made clear by subsection 4(1)(b) of that *Act* which reads:

> "4(1) Nothing in this *Act* applies in respect of...
> (b) contracts, agreements or arrangements between or among fishermen or association of fishermen and persons or associations of persons engaged in the buying or processing of fish relating to fish prices, remuneration or other like conditions under which fish will be caught and supplied to those persons by fishermen."

The trigger for the request to create an industry association should be a request based on last year's finished product by weight of fish processors who represent a majority of the production in the previous year. The amended legislation should allow Her Majesty's Executive Council for Newfoundland and Labrador, by order, to create such an organization once it has been satisfied that the above tests have been met and that its constitution meets the criteria set out in the amended legislation.

RECOMMENDATION #25: The *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* should be amended to provide for the creation of a registered industry association to represent all fish processors in this province.

RECOMMENDATION #26: The *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* should be amended so that the trigger for the request to create an industry association should be a request based on last year's finished product

by weight of fish processors who represent a majority of the production in the previous year.

RECOMMENDATION #27: The amended legislation should allow Her Majesty's Executive Council for Newfoundland and Labrador, by order, to create such an organization once it has been satisfied that the above test has been met and that its constitution meets the criteria set out in the amended legislation.

RECOMMENDATION #28: The *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* should be amended so that they contain (1) provisions vesting the employers' organization with the exclusive authority to negotiate, enter into and administer collective agreements; (2) provisions for the election or appointment of officers of the employers' organization;(3) a formula for reaching decisions of the employers' organization that assures a deadlock cannot occur.

RECOMMENDATION #29: The *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* should be amended so that they contain provisions: (1) that require the mandate of the employers' association only extends to matters related to the negotiation or enforcement of collective agreements and that fees are only chargeable to members in respect of such purposes; (2) that requires the employers' association to provide a schedule to its members and the Minister of Labour of all such fees and an accounting showing that they only relate to expenses related to the negotiation or enforcement of a collective agreement; (3) that enables the association to provide the Minister of Labour with a list of those who fail to pay any properly assessed fee 30 days after they become delinquent and enables the Minister to issue a certificate which the association may the file with the Supreme Court of Newfoundland and Labrador, Trial Division as a judgment, register with the Sheriff's Office and collect; and (4) that makes fees based on per species negotiation payable by all members who are licensed to process that species.

RECOMMENDATION #30: The *Fishing Industry Collective Bargaining Act* should be amended to include a provision like that contained in Subsection 51(1) of the New Brunswick *Industrial Relations Act* so as to establish a duty of fair representation of members by a registered industry

association and by the certified bargaining agent for fish harvesters.

RECOMMENDATION #31: The *Fishing Industry Collective Bargaining Act* should be further amended to provide members of the certified bargaining agent for fish harvesters and an employers' association access to the Board in a case where there was an allegation by a member of an organization of a breach by that organization of a duty to represent that member fairly.

RECOMMENDATION #32: The amended legislation should provide that once a registered industry organization is created pursuant to Recommendation #27, section 13.1 of the *Fishing Industry Collective Bargaining Act* which provides for the creation of an accredited processors' organization should be suspended while a duly constituted registered industry organization is in place and the role of any then accredited processors' organization should be supplanted by the new registered industry organization.

RECOMMENDATION #33: Section 13.7 of the *Fishing Industry Collective Bargaining Act* should be amended to only permit raiding of a registered industry association during the same time period that I have proposed for electing to opt out of the model, namely November 1 through December 31 of the second year of a two year cycle.

AUCTIONS

The Vardy Task Force, which paved the way for the introduction of the present final offer selection model, recommended that the parties should experiment with an electronic auction system, using a hail at sea system in the 3Ps cod fishery in 1998 or 1999. Although the legislation was amended to enable this to occur, such a pilot project never took place. From my knowledge of the industry, there were three reasons why this occurred. Firstly, resistance on the part of certain processors who had tied financing relationships with certain fish harvesters on the effect such auctions could have on such relationships. Secondly, the inability of the parties to collective bargaining to agree on the terms under which such an auction might be held. Thirdly and perhaps most significantly, the fact that initially at least both parties were content with the current final offer selection model.

What the members of the Vardy Task Force or the parties to collective bargaining did not foresee was the development of the kind of *de facto* auction system that now exists in this province for fish as a result of developments in the fishing industry and the proliferation of bonus or extra payments to fish harvesters that competition for raw material amongst individual processors has caused.

Having reviewed the matter with the parties to collective bargaining under the current regime, they and I are in agreement that there may be merit in exploring the utility of pursuing an auction pilot project on a regional basis and in a fishery, such the west coast lobster fishery next year to determine its benefits. Accordingly, government should amend the *Fishing Industry Collective Bargaining Act* to permit such a pilot project to take place. In a spirit of cooperation, the parties to that fishery being harvesters and processors and their representatives should constitute a joint committee to oversee that process.

RECOMMENDATION #34: Government should amend the legislation to facilitate an auction system, to be piloted in 2004 in the west coast lobster fishery, and to be overseen by a committee jointly representing fish harvesters and processors.

BONUS PAYMENTS

Perhaps one of the most bedeviling problems that I faced during the course of this study relates to the subject of bonus payments and how to deal with them. Bonus payments are extra payments made or benefits given to the seller or sellers of fish by a fish processor. On their face the subject of bonus payments by fish processors to fish harvesters would seem to be quite innocuous.

Historically, in the inshore fishery all monies received by a boat respecting sales of fish were allotted into crew shares and divided up thusly. A share was apportioned to: the boat; the skipper or captain; and each of the crew. In this manner, the crew received the benefit of any payments for fish, including bonus payments made to the boat. Over the last ten years these traditional sharing arrangements have broken down in the fishing industry. Now myriad arrangements exist - from salaried relationships between vessel owners and fish harvesters, to part salary and part sharing arrangements. The traditional sharing arrangement is now more of an exception than a rule.

In many sectors bonus payments are usually made as a reward for good or exceptional performance. In the fishing industry it now appears to me that bonus payments are made as a means of obtaining or ensuring a source of supply of a given fish product from a given fish harvester or harvesters to a given fish processor and indirectly as a reward for performance or the promise to perform that delivery. Sometimes they are made at the beginning of a season, sometimes at the end and sometimes at both junctures in time. When they are paid, they may take monetary form, or come in the form of gifts of vehicles, airline tickets, or the free use of condominiums in such places as Florida. When paid up front, it was reported to me by one fish harvester, bonus payments may be used in certain cases to facilitate double eligibility for employment insurance.

In certain cases, depending on the type of financing arrangements that exist, as where a fish harvester's vessel is substantially financed or underwritten by a fish processor, no bonus payments are made to the vessel's owner, or if they are, then they are more limited than would otherwise be the case.

As I stated earlier in this report, the complexion of the fishing industry has been changed by the existence of the present lucrative crab industry. Those harvesters of crab who are not in tied relationships with fish processors limiting their ability to request bonus payments, are in many instances able to command bonus payments from the fish processors with whom they do business as a condition for selling their crab to them. As well, in certain instances they are also able to use this advantage to lever fish processors into buying other species such as cod at prices higher than those species would otherwise obtain based upon the grade of that fish.

It is now a fact that the crab fishery drives the economics of the fishing industry and that those fish harvesters who do not have a license to harvest crab are unable to in most, if not all, instances to obtain bonus payments for their catch.

> ***"As long as there are different fleet sectors with different quotas, there will be differences in the level of bonus payments"***
> \- Excerpt from public consultation records

Further, I was told that there is an unofficial but very real graduated scale of bonuses. Those fish harvesters having full-time crab licences and the largest quotas are able to command the largest amounts of bonus payments absolutely and as a percentage of the price of fish per pound, members of the large supplementary fleet receive the next level, and fish harvesters in the smaller, under 35-foot vessels receive the smallest bonuses relative to the other two classes.

Because of the nature of the relationships that exist in the industry, it is impossible for me to state what these amounts are. I can state with certainty, based on the reports that I did have this year, that early in the season some bonuses were as high as $1.04 per pound above the negotiated price, greatly above the level that historically existed in this industry since the model's existence, which at the outside would have been 20 to 25 per cent of the negotiated price.

Furthermore, it seems to me that events of the last several years, including protests and demands by different fleet sectors for bonus payments have led to an expectation on the part of fish harvesters that bonus payments will be made as a price for doing business. Some processors also subscribe to this theory.

The fact that not all fish harvesters receive or share in a percentage of bonus payments or receive the same levels of bonus payments or know the amounts of the same has been a source of some suspicion, enmity and hostility on the part of fish harvesters directed towards fish processors. Harvesters and their representatives believe the existence of bonus payments is an indicator that fish processors can afford to pay more than the minimum collectively bargained price. Some small boat harvesters have suggested that the gaps between small and large boat bonuses should be narrowed.

Some harvesters see bonus payments as a threat to the credibility of the process and a threat to the basis for the union's existence. This has led to division within the union and the industry and between fish harvesters in the same union from different fleet sectors. From the processors' perspective, the making of bonus payments is a necessary cost of doing business within the current system in order to obtain fish, or to maintain a supply of fish. This they see as all the more especially true given the level of surplus processing capacity that still exists in the fishing industry. With this observation I agree. The matter of surplus capacity is one that Mr. Eric Dunne will have to deal with in his structural review of the industry.

***"Bonus payments are a fact of life;
a way of doing business."***
- Excerpt from public consultation records

In my opinion, it was the quest for a supply of raw materials early on in the season, while American market prices for processed crab were high, which led to the bidding war for fish prices this year. The payment of bonuses led to the shutdown in the industry this May, when it became clear that the making of such payments and promises to make such payments could not be sustained on an ongoing basis, given shifts in currency exchange rates (primarily Canada - U.S.) and changes of supply and demand in consumer markets.

As was stated to me by a number of processors, given the level of competition for raw material that exists in the industry, the existence and growth of bonus payments makes it difficult for processors to develop sound business plans and to forecast costs throughout the season and from year to year. As one processor put it, it is difficult to know the price of fish even after it has been purchased, as a fish harvester could return to demand more money for the same fish, at the end of the season in which it was purchased or at the beginning of the next season. Invariably, the harvester's objective is parity with some other harvester who has received a larger bonus and the consequence of non-payment is loss of supply. Such demands affect processors' margins and their bottom line in a way that they state undermines the credibility of the process and bankers' and investors' confidence in their operations.

Indeed, it seems to me that the need to make bonus payments and the fear of losing raw materials supply have done much to erode the confidence that fish processors have in the model. Rather than leading to a situation of final offer selection, they state that all the model does is establish an opening price for a given fishery, after which, or during which process, the real price negotiation fixing the price for that fish occurs - not at the bargaining table or in the arbitration process, but separately between individual fish harvesters and processors. Other than for fish harvesters who are tied to particular fish processors, this leads to a kind of *de facto* auction or price competition for raw material between fish processors, where the ability to command a higher price depends upon the negotiating skills and amount of crab that a given fish harvester has to broker.

The existence of such payments, particularly where they are not enjoyed at the same levels between fleet sectors or with crew members, has also led to criticism both of this process and of the union by individual fish harvesters. Real or imagined, in the minds of certain commentators on this process, the making of bonus payments has left the impression that money is being left on the negotiating table and that a fair or the true price to be paid for fish in any season is not being negotiated or arbitrated. Only by negotiating "the price" for fish, they state, can harmony be achieved.

"Excess capacity in the processing sector is at the root of the high competition that results in bonuses and extra payments."

- Excerpt from public consultation records

While there are elements of truth in this, in fairness, the parties to negotiations have chosen to use the model to achieve the minimum price for fish. Although this year's Memorandum of Understanding between the parties provides for it, they have not yet negotiated a fixed price for a given fish species. Even if they had, there is nothing in the existing model or the legislation that supports it that would make bonus payments illegal.

Indeed, as long as they are reported by the person who receives them as income and the person who makes them as an expense to the income tax authorities, there is nothing about the making or receipt of a bonus payment that is improper, in and of itself. Only if such payments are not reported as stated or if the making of such payments is used as a device by one processor to force another out of business by engaging in predatory pricing would they become illegal under the *Income Tax Act* or the *Competition Act* respectively.

Even if the making of bonus payments could be made illegal, it is doubtful that the policing of such a regime could take place without an intrusive audit and policing regime of the sort that I am not prepared to recommend and that I believe neither processors nor harvesters want. In my opinion, by establishing a fixed price for fish as a commodity by negotiation, arbitration or legislation, industry or government would not eliminate bonus payments, but only drive them further underground and offshore where they could not be policed. This would create greater secrecy and suspicion in the industry and further jeopardize the credibility and transparency of the process. Like the kinds of bonus payments that exist in other industries we must once and for all face the fact that bonus payments in the fishing industry are the reality and here to stay as long as competition exists. Their amount and the levels at which they are made are matters between individual fish harvesters and processors, unless the parties to negotiations and arbitration decide to make them part of the bargaining process.

The majority of respondents felt that it would not be possible, neither would it be desirable to use legislation to control the amounts of, to whom, and the manner in which bonuses and extra payments are paid.

Subject to what I have stated, free market forces and laws of general application should determine the level of bonus payments in the industry. Government cannot legislate common sense in the industry. If processors compete to drive up the price of a commodity such as fish for competitive reasons they must do so in the knowledge that they are putting their profit margins and enterprises at risk. If they do so with the intent of putting another processor out of business, then they must realize that the persons engaging in such unlawful activity are putting both their enterprises and their personal liberty at risk, as the Competition Bureau, acting under the authority of the *Competition Act,* will doubtless take action to regulate or punish such activity.

Indeed, in the absence of a negotiated or arbitrated agreement between the parties regarding bonus payments, the provincial government has no role and should not act to legislate to limit the making or amounts of bonus payments.

As to the suggestion made to me that government should intervene to ensure bonus payments are equally shared between the different sectors of the fishing fleet or that all fish harvesters working on a vessel should receive a share of the bonus payments made to that vessel, these are, again, not matters for government. It is within the prerogative of the fish harvester owners of these vessels to enter into contracts or sharing arrangements with the people who crew these vessels, as they see appropriate, just as it was they who ended the traditional income sharing arrangements that existed in these vessels. As long as no labour laws are being broken in the process, and I have seen no evidence of this occurring, government has no role and should not intervene in such matters legislatively or otherwise.

Such circumstances are a new reality in the fishery that all parties to collective bargaining, including fish harvesters, should adjust to unless they wish to negotiate and agree otherwise among themselves. The fact is that even if the amounts of bonus payments were included and covered under a collective agreement, while it might affect on the level of payments made between different fleet sectors, it would do nothing to effect a change in the kind of crew sharing arrangements that exist within vessels, since these are private arrangements between vessel owners and their crew and not ones to which processors are a party.

"It makes more sense to negotiate a price that is closer to the one actually paid."
- Excerpt from public consultation records

Having stated the above, however, I believe that the parties to negotiations and collective agreements involved in the purchase and sale of fish in this province would be wise to show degrees of commercial prudence and restraint in dealing with the subject of bonus payments. My analysis of the situation that the industry is facing indicates that it would seem to make more sense and to be more commercially viable and reasonable for the parties to try to negotiate a price for fish that more properly reflects its true sale value.

Bonus payments should be left to situations they are normally restricted to in other commercial settings, that is rewarding superior or value-added performance at levels that reflect just that and not be a substantial component of the price of fish. Taking such an approach would do much to restore the degree of trust in the industry that is necessary for the model to continue and for labour relations stability to be achieved over time.

So that there is no doubt, let me make clear to the parties and government what I believe will occur if such a rational approach as I have suggested is not taken - dissatisfaction with the model will increase to the point that its utility and existence will be threatened and the level of competition for raw material in an industry characterized by over-capacity will continue to increase to the point that the operation of certain smaller and medium sized plants in the fishing industry will be threatened and they will cease to exist. Should the latter occur, this will give rise to greater levels of corporate concentration in the industry, lead to fewer jobs, and reduce the margins and efficiency of existing and remaining companies in the industry, at least in the short term - all of which will have an adverse effect on the industry, the province and the price that fish processors will be able to offer to pay to fish harvesters.

It is for these reasons and also to maximize the economic benefits and returns of the industry to fish processors, fish harvesters, plant workers and the people of this province that I advocate that government and the parties consider and pursue the Social Compact that I outline in a subsequent section of this report.

RECOMMENDATION #35: Government should not legislate to limit or outlaw the making of bonus payments or to regulate the amounts of bonus payments that fish processors may pay to fish harvesters.

RECOMMENDATION #36: Government should leave it to the parties, if they choose to do so, to negotiate the level of bonus payments and how they will be distributed between fleet sectors.

RECOMMENDATION #37: If the parties wish to achieve trust and long-term labour relations stability, they should negotiate a price for fish that more properly reflects its true value as between fish harvesters and processors, and only use bonus payments to reward superior or value-added levels of performance and then only at levels that no longer form a substantial component of the price of fish.

RECOMMENDATION #38: If the parties wish to achieve trust and long-term labour relations stability and to maximize the economic benefits and returns of the industry to fish processors, fish harvesters , plant workers and the people of this province,

government and the parties should consider and pursue the Social Compact approach outlined in the Towards a Social Compact section of this report.

FINES AND PENALTIES

Over the last several years FANL has made a number of representations to government that the level of fines and penalties contained in the *Fishing Industry Collective Bargaining Act* are too low. These representations were made in the context of ensuring that collective agreements reached between the parties to negotiations were binding upon those covered by them by making the fines of sufficient weight to deter breaking or violating the terms of a collective agreement. Their position was repeated in FANL's submission last year when I arbitrated the MOU governing collective bargaining and again this year in FANL's submission to me.

The matter of making collective agreements more enforceable and the means by which this may be done has been adequately dealt with elsewhere in this report. However, there remains a need to address the level of fines and penalties contained in the *Fishing Industry Collective Bargaining Act*, which have not been updated since the *Act* was first introduced in 1971. In contrast, the fines and penalties sections of the *Labour Relations Act* were updated in 2001 and are reflective of the trends across the country. For example, the fines provided for engaging in unlawful strikes and lockouts range from $150 to $300 per day under the *Fishing Industry Collective Bargaining Act*, as opposed to a range of $1,000 to $10,000 per day under the *Labour Relations Act*.

Under the *Labour Relations Act*, failure to comply with a Board order may result in a maximum fine of $500 for an individual and $5,000 for a union or a company. There is no such fine provided in the *Fishing Industry Collective Bargaining Act*. In addition, the *Fishing Industry Collective Bargaining Act* contains a fine for any processor who, during the negotiation of a collective agreement, alters the terms regarding the purchase of fish. The fine is the lesser of $5 per fish harvester per day or $250 per day. In 1971 this may have been punitive; it is doubtful whether this continues to be so.

Given the amount of money that is at stake in the fishing industry and the impact that strikes and lockouts, which are prohibited under the model may have on the provincial economy, the level of fines and penalties contained in the *Fishing Industry Collective Bargaining Act* is far too low.

Accordingly, I recommend that the level of fines provided for in the *Fishing Industry Collective Bargaining Act* be increased to the levels contained in the *Labour Relations Act*. Specifically, I recommend that the level of fine for engaging in an illegal lockout as provided for in section 38 of the *Fishing Industry Collective Bargaining Act* be raised to $1,000 for each day that the illegal lockout exists for each employer or employers organization that declares, causes or participates in an illegal lockout for each day that it exists; and that any person acting on behalf of an employer's organization engaged in such activities would be liable to a fine not exceeding $10,000.

A similar provision should be introduced covering strikes and that the level of fine for engaging in an illegal strike as provided for in section 39 of the *Fishing Industry Collective Bargaining Act* should be raised to $1,000 per day for any trade union or council of trade unions that declares, causes or participates in an illegal strike for each day that it exists; and that any person acting on behalf of a union or council of trade unions organization engaged in such activities would be liable to a fine not exceeding $10,000, as would any fish harvester that participated in the same.

The fine provided for in section 37 of the *Fishing Industry Collective Bargaining Act* for a processor, person, association, or processors' organization engaging in an unfair trade practice should be raised to a maximum of $1,000 in the case of an individual and $10,000 in the case of a corporation, association or processors' organization. I also recommend that the provision contained in that section enabling a provincial court judge to order a processor to pay compensation to a fisher not exceeding the profit that the judge determined would have accrued to the fisher to the date of the conviction for the violation be retained, but the cap of $200 contained in it be removed.

I also recommend that a similar provision be added to provide for penalties for a fish harvester, a union or a council of trade unions engaging in an unfair labour practice with a similar provision enabling a provincial court judge to order a fisher to pay compensation to a processor not exceeding the profit that the judge determined would have accrued to the processor to the date of the conviction but for the violation. The general penalties provided for in section 39 of the *Fishing Industry Collective Bargaining Act* should be raised in the case of an individual to a fine not exceeding $1,000, and in the case of a corporation, association, or processors' organization to a fine not exceeding $10,000 with a union or council of trade unions to be added to this category.

The fine for an association or person other than an association engaging in a prohibited act under section 40 of the *Fishing Industry Collective Bargaining Act* should be raised to a level not exceeding $10,000 and in the case of an individual engaged in such acts be raised to a maximum of $1,000. The level of fine for a processor and every person acting on behalf of a processor who alters a rate of pay for fish or another term or condition of a collective agreement contrary to section 36 of the *Act* be changed and raised to $5,000 per day, from the current provision of the lesser of $5 per harvester or $250 per day.

RECOMMENDATION #39: The level of fines provided for in the *Fishing Industry Collective Bargaining Act* should be increased to at least the levels contained in the *Labour Relations Act*.

Specifically: (a) that the level of fine for engaging in an illegal lockout as provided for in section 38 of the *Fishing Industry Collective Bargaining Act* be raised to $1.000 for each day that the illegal lockout exists for each employer or employers organization that declares, causes or participates in an illegal lockout for each day that it exists; (b)that any person acting on behalf of an employer's organization engaged in such activities would be liable to the fine not exceeding $10,000; (c) that a similar provision be introduced covering strikes and that the level of fine for engaging in an illegal strike as provided for in section 39 of the *Fishing Industry Collective Bargaining Act* be raised to $1,000 for each day that the illegal strikes for any trade union or council of trade unions that declares, causes or participates in an illegal strike for each day that it exists; (d) that any person acting on behalf of a union or council of trade unions organization engaged in such activities , would be liable to the fine not exceeding $10,000, as would any fish harvester that participated in the same; (e) that the fine provided for in section 37 of the *Act* for a processor, person, association, or processors' organization engaging in an unfair trade practice be raised to a maximum of $1,000 in the case of an individual and $10,000 in the case of a corporation, association or processors' organization; (f) that the provision contained in that section 37 enabling a provincial court judge to order a processor to pay compensation to a fisher not exceeding the profit that the judge determined would have accrued to the fisher to the date of the conviction for the violation be retained but the cap of $200 contained in it be removed; (g)that a similar provision be added to that referenced in paragraph (f) hereof providing for similar penalties for a fish harvester,

> **a union or a council of trade unions engaging in an unfair labour practice with a similar provision enabling a provincial court judge to order a fisher to pay compensation to a processor not exceeding the profit that the judge determined would have accrued to the processor to the date of the conviction but for the violation to be added to the *Act*; (h) that the general penalties provided for in section 39 of the *Act* be raised in the case of an individual to a fine not exceeding $1,000, and in the case of a corporation, association, or processors' organization to a fine not exceeding $10,000 with a union or council of trade unions to be added to this category; (i) that the fine for an association or person other than an association engaging in a prohibited act under section 40 of the *Act* be raised to a level not exceeding $10,000 and in the case of an individual engaged in such acts be raised to a maximum of $1,000; (j) that the level of fine for a processor and every person acting on behalf of a processor who alters a rate of pay for fish or another term or condition of a collective agreement contrary section 36 of the *Act* be changed and raised to $5,000 per day, from the lesser of $5 per harvester or $250 per day.**

I believe these measures will bring fairness and balance to the penalty provisions of the *Act* and are in keeping with my earlier recommendations.

CHAPTER IV

CONSIDERING OTHER MATTERS

QUALITY MEASURES

Improving fish quality and maintaining it to the extent that is commercially reasonable and practical has to be at the heart and centre of what the industry is about if we are to occupy, enhance and maintain our rightful place in world fish markets. All stakeholders in the industry have a collective interest in ensuring this is so. Quality is something that, when lost, cannot be restored.

Since the model's inception there has been a steady and a marked improvement in the quality of the fish products landed and processed in this province, as fish harvesters and processors have come to realize that only by maintaining and improving quality can they hope to grow the industry and realize greater economic benefits from it. All parties, fish processors, fish harvesters and government, are to be commended for their collective efforts and success. But continued vigilance in this area is necessary. Gone are the days, given the state of the precious resource that we have left, when we can afford to market one pound of inferior quality fish as something other than what it is.

The introduction of the model has led to a number of significant quality improvements in the industry. The transparency that it has produced has led the preponderance of industry players to realize that they each have a stake in the quality of the fish products that they produce and that quality and a timely source of supply are the best ways we have of ensuring that fish processors and harvesters achieve optimum results and maximum price for their products. Those who do not realize this have no place in the fishery of the future in this province.

In my opinion the model has helped lead all players in the industry out of the wilderness to an understanding that improving quality and maintaining and assuring a consistent supply of raw materials to processors and product to market is in everyone's best interest. It has also contributed to an understanding, sometimes perhaps reached grudgingly, that the economics of one side is just as important as the other and that while the parties can, to a certain extent, control their respective and collective destinies there are certain market forces such as exchange rates, price sensitivities, substitution in foreign markets for our fish, supplies of fish from elsewhere and general economic conditions in world markets that can affect the economics of the industry.

As was written in the Vardy Task Force Report, quality is only as good as the weakest link in the chain. Constant vigilance is necessary in this area to ensure that we succeed. Without quality at all stages in the harvest and production process, it is and will be impossible for us to develop and diversify into the new fish product lines that the world is demanding of top quality producers. Simply put, we will not be able to grow this industry in the way that we should for the benefit of the people of the province and all industry participants. We will be relegated to being price takers, instead of price makers, to the detriment of all industry participants and their incomes and the collective bargaining process.

One of the great ironies and paradoxes that a situation of unusually high prices in the fishing industry can produce is a denigration in the price and quality of fish. This is especially true where there is fierce competition to acquire raw material bidding up the price to respond to a high price point in an international market for a given commodity. The result is a high level of landings which must be processed in a short period of time for shipment to market. In effect this is what happened in 1995 in the crab fishery as processors, in certain cases having paid high prices for as much product as they could get, were forced, by competitive forces and their own actions, into having to process and market as much of that fish as possible, regardless of the quality. The alternative was to perish. This situation nearly happened again in this past Spring.

The long-term effect of this phenomenon is to produce a downward compression on fish prices by fish buyers in world markets when and if inferior products are sold. This, in turn, affects the dynamics of the collective bargaining process, as low market prices mean less money for negotiations. It also means that there could be a move from Newfoundland and Labrador as a source of supply in situations where fish comes on line from another developing or a recovering fishery, such as the Alaska crab fishery.

The other thing that we must appreciate is that our industry has to compete in a global village. For example, the development of fisheries and fish processing in China, and sales in fish products from that country supported by low labour rates there, are not just threatening to undercut and displace Newfoundland and Labrador fish products, but those of other countries as well.

If we are to be global players and to solidify, maintain and improve our position, then we must ensure that our laws are only as prescriptive as they need to be to ensure high quality products fetch the best prices, so that the benefits may be properly shared in the collective bargaining process. At the same time policies, laws and regulations must be flexible enough for the fishing industry to innovate and improve processing and harvesting techniques to achieve the quality outcomes and social and economic benefits that a prosperous and orderly fishery can bring to the province.

In this regard, the participants in this industry can become price makers, if they act if they choose to act responsibly and collectively. I believe there are a number of improvements that can be made by government to this province's *Fish Inspection Act*, related regulations and policies, that can support and bulwark the other recommendations contained in this report.

Accordingly, I recommend that the province, in consultation with industry, complete a review of the *Fish Inspection Act* and regulations, with a view to repealing outdated and unduly prescriptive regulations and focusing on amending and strengthening laws, regulations, policies and practices which improve quality outcomes.

Furthermore, and to the extent it does not conflict with the above or the province's existing licensing policy and in-province processing requirements, government should amend the provisions of the *Fish Inspection Act* and the Fish Inspection Regulations and harmonize them with the regulations maintained by the Canadian Fish Inspection Agency regarding the processing of fish as a food product. Such an approach would make it easier for industry to function in the current regulatory environment and enable it to better focus on measures that will lead to innovation and progress in the fishing industry.

A number of landmark reports have already set out the roadmap that industry and government should follow to achieve the kinds of quality outcomes and socio-economic benefits that recommended in this report. Specifically, I refer to the quality related recommendations contained in the Vardy Task Force and the Shrimp Panel Report of 2001, also chaired by David Vardy. Both these reports and their findings on quality had wide industry input, acceptance and support and should be implemented. I further recommend that to the extent that this has not occurred, government should take all necessary steps and measures to implement the quality recommendations of the Vardy Task Force and the Shrimp Panel reports, unless alternate acceptable or better measures can be found.

If fish harvesters and processors are to maintain and build upon the high level of gains that have been made in the fishing industry, then adequate and proper policing of the laws and regulations made under the *Fish Inspection Act* should occur. In this there is a vital regulatory role for the province to play. I am, however, mindful of the expenses associated with enforcement activity, and I do not believe that every processor and harvester bears close scrutiny day in and day out. Accordingly I recommend that the province adopt a risk management approach to dealing with quality-related problems in the fishing industry and target problem cases with progressive fines and penalties. Sanctions meted out by the Minister of Fisheries and Aquaculture should include the temporary, and if necessary, permanent suspension of an offender's fish processing licences. In addition to this, processors who habitually flaunt or violate the province's laws should be prosecuted.

In support of the above measures, I further recommend that inspectors employed by the Department of Fisheries and Aquaculture should continue to be deployed in plants and on wharves and other strategic locations throughout the province to inspect fish landed in this province that is to be processed here, in vessels and on docks, during transport and at all stages of production. This includes the final pack mix stage to ensure that the quality measures advocated in this report are achieved.

The Department of Fisheries and Aquaculture plays a vital role in the collective bargaining model by arbitrating quality related differences the parties cannot resolve. This is done immediately before the commencement of collective bargaining on price, and in accordance with the parties' commitment to expedient dispute resolution, the department renders a decision with 48 hours. This function is enshrined in the parties' MOU and should continue.

Further, within its own sphere of constitutional authority, and at the request of the negotiating parties to collective agreements that are binding on all fish harvesters and processors, the provincial government has implemented the outcomes they achieved on quality as a condition to the various fish processing licenses issued by the province. However, to ensure that such measures are put beyond the pale of legal challenge and that they are equally and properly binding on all fish harvesters and processors involved in a given fishery in this province, the government should amend the *Fish Inspection Act* to enable the Minister of Fisheries and Aquaculture, by ministerial order having the force of a regulation, to adopt quality measures agreed upon by the industry as a result of negotiation or arbitration under the *Fishing Industry Collective Bargaining Act* and make them applicable and binding on the whole industry in this province.

RECOMMENDATION #40: In consultation with industry, government should complete a review of the *Fish Inspection Act* and regulations, with a view to repealing outdated and unduly prescriptive regulations, and focus on amending and strengthening laws, regulations, policies and practices which improve quality outcomes.

RECOMMENDATION #41: To the extent it does not conflict with the above or the existing province's licencing policy and in-province processing requirements, government should amend the provisions of the *Fish Inspection Act* and the Fish

Inspection Regulations and harmonize them with the regulations maintained by the Canadian Fish Inspection Agency regarding the processing of fish as a food product.

RECOMMENDATION #42: To the extent that they have not already been implemented, government should take all necessary steps and measures to implement the quality recommendations contained in the Vardy Task Force and the Shrimp Panel reports, unless alternate acceptable or better measures can be found.

RECOMMENDATION #43: The province should adopt a risk management approach to dealing with quality related problems in the fishing industry and employ progressive fines and penalties; with sanctions meted out by the Minister of Fisheries and Aquaculture including the temporary, and if necessary, permanent suspension of an offender's fish processing license(s).

RECOMMENDATION #44: Inspectors employed by the Department of Fisheries and Aquaculture should continue to be deployed in plants and on wharves and in other strategic locations throughout the province to inspect fish landed in this province that is to be processed here. They should be deployed in vessels and on docks, during transport and at all stages of production, including the final pack mix stage, to ensure that the quality measures advocated in this report are achieved.

RECOMMENDATION #45: Government should amend the *Fish Inspection Act* to enable the Minister of Fisheries and Aquaculture, by ministerial order having the force of a regulation, to adopt those quality measures agreed upon by fish harvesters and fish processors as a result of the negotiation or arbitration of a collective agreement binding on the whole industry under the *Fishing Industry Collective Bargaining Act* so as to make such measures applicable and binding on the entire fishing industry in this province.

Grading and Graders

Just as quality is essential to establishing and maintaining our proper place in world markets, grading is essential to determine the proper price of fish so that the system of collectively bargained prices for fish may continue to have merit and collective agreements may be properly administered and enforced. Grade standards are an integral part of the collective agreements that have been reached in this province for all fish species since 1998. That year Tavel Limited, a private company, was engaged by FANL on behalf of its processor members to do that grading of fish which was necessary to enforce the terms of a concluded collective agreement.

Since 2001, at the request of the parties to collective bargaining and in an attempt to make them enforceable against all parties to a collective agreement that is binding on all processors, these grade standards have been incorporated by reference and made a condition of all processing licenses for a negotiated species by a ministerial directive issued under the authority of the *Fish Inspection Act*.

From the inception of this grading regime, there was hostility towards it. Some processors do not see its relevance to their operations. They view it as a device by which FANL and the union wish to force their view of the world on them regarding how to do business. On the other hand, certain fish harvesters see it as a means to downgrade the price of their fish. A number of fish harvesters and their representatives had problems with the fact that the union was not always consulted by Tavel Limited when a dispute arose as to how to interpret a particular grading requirement as set out in a collective agreement. They see Tavel Limited as an extension of FANL, when in all truth this is not the case. However, given the history of relations between fishermen and merchants that is so much a part of our culture, I can understand why they feel this way.

With respect to those who feel they can run their business without the current grading regime, I have no doubt that they can; however, since 1997 a new collective bargaining regime has existed in this province, a regime under which a collective agreement reached between the FFAW/CAW and a processors' organization representing more than 50 per cent of the finished product weight for the species concerned is meant to be binding on all fish harvesters and processors in this province. For this regime to have credibility, its provisions must be enforceable.

In the last several years there have been a number of challenges to that regime and the authority of the Minister of Fisheries and Aquaculture to incorporate, by reference, as a condition of fish processing licenses, the terms of collective agreements binding on all fish processors and harvesters in this province. In a court case this year, based upon the manner in which the Minister exercised her authority, a challenge was successful. As well, a number of processors have refused to pay the fees to FANL associated with maintaining such a grading regime in place.

As for the people who do the job of grading, their independence and qualifications are continually questioned by fish harvesters and fish processors who either disagree with their decisions or want no part of the existing grading regime. Furthermore, some parties suggested to me that graders have experienced pressure from processors and harvesters to be less than accurate in their findings.

Such actions undermine the efficacy and effectiveness of this important pillar of collective agreements under the final offer selection model. To address this situation a number of legislative and regulatory changes are needed.

In the lumber industry in this province and elsewhere, there was a time when the independence and methods of those who measured wood cut by loggers was questioned. This led to considerable friction and labour relations disputes - not unlike the situation that exists in the fishery today. To address that situation the class of persons doing the measuring of wood, known as timber scalers, who worked for the woods companies, were given statutory protection and independence from interference by anyone including their employers. Combined with proper training, this led to harmony in this area of that industry.

In my opinion a similar approach should to be taken in the fishing industry. Accordingly, I recommend several measures to be taken by government.

Government should amend the *Fish Inspection Act* to make provision for the licensing and appointment of fish graders, irrespective of their employer, to provide for their independence, and to make it an offence under the *Fish Inspection Act* to interfere with, attempt to interfere with, intimidate or attempt to intimidate a fish grade grader.

All fish graders and any person or organization selected by the fishing industry for grading purposes under a collective agreement should be licensed for such purpose by the Minister of Fisheries and Aquaculture. On the advice of the parties to collective bargaining, the Minister of Fisheries and Aquaculture should also adopt in regulation standards for the licensing of fish graders.

Where the industry fails to recommend fish graders to the Minister of Fisheries and Aquaculture for appointment, the *Fish Inspection Act* should be amended to give the Minister of Fisheries and Aquaculture the authority to do so.

The amended regulations made under the *Fish Inspection Act* should provide that any dispute regarding the activities of graders should be referred in the first instance to a panel composed of processor and fish harvester representatives, for discussion and resolution. The Minister of Fisheries and Aquaculture should retain the residual ability to determine the matter in the absence of such a panel or if the parties cannot reach agreement.

RECOMMENDATION #46: Government should amend the *Fish Inspection Act* to make provision for the licensing and appointment of fish graders, irrespective of their employer, to provide for their independence, and to make it an offence under the *Fish Inspection Act* to interfere with, attempt to interfere with, intimidate or attempt to intimidate a fish grader.

RECOMMENDATION #47: On the advice of the parties to collective bargaining, the Minister of Fisheries and Aquaculture should adopt in regulation standards for the licensing of fish graders, failing which advice the Minister should establish such standards.

RECOMMENDATION #48: All fish graders and any person or organization selected by the fishing industry for grading purposes under a collective agreement should be licensed for such purpose by the Minister of Fisheries and Aquaculture.

RECOMMENDATION #49: Amend the *Fish Inspection Act* to give the Minister of Fisheries and Aquaculture the authority to appoint fish graders should the industry fail to recommend fish graders to the Minister of Fisheries and Aquaculture for appointment.

RECOMMENDATION #50: The amended Fish Inspection Regulations should provide that any dispute regarding the activities of graders should be referred in the first instance to a panel composed of processor and fish harvester representatives, for discussion and resolution, with the Minister of Fisheries and Aquaculture retaining the residual ability to determine the matter in the absence of such a panel or if the parties cannot reach agreement.

Plant Workers

During the course of my hearings I had occasion to meet with and receive submissions from a number of plant workers. They were concerned that the wealth that they see being generated in certain fisheries was not being shared equitably with them. Their primary concerns were two-fold:

1. that they were not making enough income to have a decent standard of living and make ends meet; and
2. that they were obtaining insufficient employment opportunities from the fishery to qualify for federal programs such as employment insurance, to supplement their incomes.

Across the board plant workers expressed concern about the effects that the resource cuts made by the federal government earlier this year were having upon them and their families. They also expressed concern about the effects that trip limit increases in certain fisheries, stemming from this year's collective agreements, were having upon their work levels. They reported incremental increases in work force levels, but that collectively they were working for a shorter period of time.

"The rich must live more simply so that the poor can simply live."
- Excerpt from public consultation records

It was reported to me that some plant workers can no longer afford telephones, and neighbours are used as messengers of news that work is available. Neither processors nor harvesters expressed any willingness or ability to give up a portion of their profits from the industry to help address their concerns. Plant workers and their representatives held various protests this summer, to draw attention to their plight. It was these protests in part which triggered the structural review of the industry that Mr. Eric Dunne is conducting for the Minister of Fisheries and Aquaculture.

The fact is that fewer young people are entering this sector of the industry for obvious reasons and the demographic make-up of this important group of workers continues to reflect an increasing average age. If something is not done to address their situation soon, their plight eventually will lead to insufficient skilled workers to populate this workforce. Increased mechanization of the industry and fewer jobs will be the inevitable result.

Improved long-term labour relations stability between harvesters and processors and product diversification resulting in longer work weeks can improve the plight of these plant workers.

Plant workers' situations may also be improved if the federal government can be convinced of the merits of changes to federal employment insurance regulations and programs of federal and provincial assistance to help them qualify for benefits and income support. This is especially crucial to address the situation they find themselves in primarily as a result of cuts that have been made to resource levels.

I also recommend that as part of the structural review of the industry that is now taking place, the issue of equitable distribution of wealth from our fisheries and the qualifying period and programs that may assist plant workers be addressed.

The other recommendation I make, which has great potential to improve the lot of plant workers, is for industry and government to consider adopting the social compact approach that I advocate in a succeeding section of this report as a way of maximizing social and economic benefits to processors, fish harvesters, plant workers and the people of the province in general.

RECOMMENDATION #51: Government and industry should investigate to determine if employment insurance regulations may be changed and/or programs of general assistance established in concert with the federal government to help address the plight of plant workers caused by the lack of work resulting from this year's resource reductions.

RECOMMENDATION #52: As part of the structural review of the industry that is now taking place, the issue of equitable distribution of wealth from our fisheries and the qualifying period and programs that may assist plant workers should be addressed.

RECOMMENDATION #53: Industry and government should consider adopting the social compact approach that I advocate in a succeeding section of this report as a way of maximizing social and economic benefits to processors, fish harvesters, plant workers and the people of the province in general.

RESOURCE CONSIDERATIONS

Proper management of the fishery resources off our coasts is critical if we are to sustain and rebuild our valuable fishery resources. By proper management, I refer to the federal Department of Fisheries and Oceans, with key input and support from fish harvesters and processors, and in consultation with the provincial government. This is necessary to maintain and grow our way of life and the fishing culture that continues to define who we are as a people, which is invariably tied up with the sea.

This is why if the collective bargaining model is to succeed and have purpose and meaning, a true partnership approach to dealing with the resources for which it exists has to be cultivated and maintained. It is also why the parties in their deliberations always need to be cognizant of the biology of the fish resources off our shores to ensure from both the economic and conservation perspectives that fisheries begin in the timely manner that the model contemplates, so that harvesting and returns to the industry may take place at a time when the resource is at its optimum. We can ill afford to go back to the days when strikes and disruptions in the industry caused us to harvest fish resources like crab in too contracted a period during the months of July and August.

At the same time, the parties to negotiations need to be cognizant of the regional differences and the shorter time frames for the conduct of various fisheries that exist in various parts of the province, particularly Labrador where there is a much shorter fishing season. They should take all reasonable steps to ensure that decisions they make to delay a given fishery on the island do not impact the season in Labrador, and vice versa. They should work out resource biology issues that impact on season openings and closings, methods of catch and handling. These issues should be resolved through the joint technical committees established to deal with fishery-specific issues in advance of the next fishing season.

From the time of the model's inception, the federal government, as represented by the Department of Fisheries and Oceans, has been supportive. Acting within its mandate the federal government has introduced resource management measures dealing with such subjects as trip limits and harvesting times that support negotiated or arbitrated agreements. The Department of Fisheries and Oceans has implemented resource management measures agreed upon by the parties through negotiation or arbitration of a collective agreement. Without the sanction of the federal government, these measures would have great merit but little force and effect. Therefore, government and the parties to negotiations should encourage the Department of Fisheries and Oceans to continue to implement resource management measures agreed upon through negotiation or arbitration of a collective agreement for a species.

At the request of parties to negotiations, as reflected in the MOU between the FFAW/CAW and FANL, the Department of Fisheries and Oceans has taken on the role of arbitrating resource management differences that exist between the parties immediately prior to the commencement of collective bargaining for a given species. This role should continue to be supported by the current parties or their successors to negotiations.

While the role of the federal government has been positive, there is one matter that impacts on the efficacy of the model's functioning that needs to be resolved. Government and the parties to negotiations should encourage the federal government to settle resource management issues, including all-important quota, as early as possible, but by no later than mid-February of each year, to provide harvesters and processors sufficient time to prepare operations for their respective seasons. In the absence of quota information, it is difficult for a harvester or processor to discern the financial feasibility of the upcoming fishing season. The absence of this information can potentially impact upon negotiations for a given species.

RECOMMENDATION #54: The parties should consider biological imperatives and regional differences in biological imperatives and allow these to dictate scheduling of negotiations, in order to ensure that all available fish is harvested in the best condition and in the best possible manner.

RECOMMENDATION #55: Government and the parties to negotiations should encourage the federal government to settle resource management issues as early as possible, but by no later than mid-February of each year, to provide harvesters and processors sufficient time to prepare operations for their respective seasons.

RECOMMENDATION #56: Government and the parties to negotiations should encourage the Department of Fisheries and Oceans to continue to implement resource management measures agreed to through negotiation or arbitration of a collective agreement for a species.

CHAPTER V

CHARTING A NEW COURSE

TOWARDS A SOCIAL COMPACT IN THE FISHING INDUSTRY

> ***"There is a tide in the affairs of men and women***
> ***Which, taken at the flood, leads on to fortune;***
> ***Omitted, all the voyages of their life***
> ***Is bound in shallows and in miseries.***
> ***On such a full sea are we now afloat;***
> ***And we must take the current when it serves,***
> ***Or lose our venture."***
> - A quote from Julius Caesar by William Shakespeare

As I have stated in a recent interview on CBC's Fishermen's Broadcast, "These are times of challenge and change in the fishing industry in this province".

FANL's recent announcement of its intention to disband and wind up its operations was in my opinion a response to the frustration that it and its members felt regarding its inability to influence the course of both federal and provincial government policies, in and relating to the fishing industry, and to bring about changes that it felt were positive, not just for its members, but for the industry as a whole. For all intents and purposes its existence will end on December 31, 2003 once it has honoured its obligations under all existing collective agreements, although long before that date it will begin the process of winding down its operations. Unless it is replaced by another industry association of some sort, FANL's departure will greatly complicate the manner in which both orders of government and the union deal with the processing sector.

Nowhere else in the western world does a circumstance exist where fish processors have not organized themselves into an organization or group to represent their collective interests.

The fact is that FANL will not be taking part in collective bargaining next year. It will not be meeting with the union to discuss next year's MOU or the opening dates for fisheries. It will not be setting up a schedule of negotiations with the union or identifying the species that are to be negotiated. No joint technical committees will be established between the union and FANL. There will be no discussions between FANL and the FFAW/CAW and the federal government on resource management issues or between FANL and the FFAW/CAW and the provincial government on quality related issues critical to the efficacious functioning of the final offer selection model. There will be no negotiations and agreement between FANL and the FFAW/CAW on price and matters related to the establishment of a collective agreement.

Right now as I write, no entity representing the fish processing sector will be doing that. My expectation, however, is that one will soon come into being.

Even though the recommendations in my report contemplate a continuation of a world in which there is no FANL and no association of any sort representing industry, make no mistake that life and collective bargaining will not be easy in a world without FANL or an industry association, just as it would not be in a world without the union. To function at its efficacious best the model of collective bargaining that David Vardy, Joe O'Neill, Brian Delaney and I first recommended in 1998, and that I recommend continue, contemplates the existence of two strong parties able to clearly articulate and represent the collective interests of fish harvesters and fish processors.

Not all fish harvesters in this province agree with their union's positions and many do not participate in its activities. Indeed, some of these individuals would rather not be part of any union. Equally so, FANL had dissident members and those outside its ranks that disagreed with its stance on particular issues. Notwithstanding this, at least up until now there has been someone on each side able to articulate, focus and advocate the preponderance of the views for each side.

In a world without FANL whom will government and union call upon to determine the position of the fish processing sector on issues of vital importance to the fishing industry? A grouping of the major processors? All processors individually? Or some representative combination of the above? No matter how it is done, determining the position of processors on any issue of public importance has now and will shortly become even more cumbersome with FANL's departure from the scene.

In the absence of an industry association representing whatever their collective interests are, individual processors will act in their own self interest. And even though they know and understand the benefits of the final offer selection model for themselves and the industry, they will not willingly participate in a model that is imposed on them.

Right now there is a storm brewing on the horizon. In the parlance that fish processors and harvesters will understand and, as my grandfather used to say, "A black breeze has blown across the water." As I write, fish processors in the fishing industry, particularly in the crab and shrimp sectors, are preparing for a battle for survival next year. Already, they are topping up their war chests and beginning to make certain decisions not to participate in marginal fisheries this Fall that could tie up money in inventory but create needed employment in the processing sector for plant workers.

Unless this battle is averted, there will likely be a free-for-all in the fish processing sector next year where the strong will survive and the weak will perish. This will do nothing to improve the collective lot of Newfoundlanders and Labradorians. A few people in the fish harvesting sector may prosper for a season from the higher gains that they will receive as a result of this battle, but only for a season. In the short term, we will be left with a weakened, poorer fish processing sector having fewer players in it.

But it does not have to be that way. There is another better way that we can follow, that will see increased benefits over time if we just have the courage and the wisdom to reach out and take it. We must keep our eyes on the horizon and look to the future if we are to survive, succeed, grow, and prosper as a people and an industry. Out of FANL's ashes can come a new organization and a phoenix of new life for the industry.

It is for this reason that I am recommending that, later this Fall, the industry, fish processors and harvesters pursue discussions on a new concept, a social compact in the industry, with a view to agreeing upon the same and having it and its elements fully implemented in time for next year's fishery. The idea was first raised by me earlier this summer and grew out of discussions at a summit that I held with members of FANL and the FFAW/CAW on August 6th.

A social compact is an agreement made among parties to create a regime and a code of conduct that will regulate their activities for a specific purpose or to achieve an identified set of goals. In the fishing industry, a social compact should be designed to achieve long and short term labour peace in the fishing industry while growing and promoting the industry so that all may share in and reap the benefits of that growth in a manner that is fair and equitable. Under such a scheme fish harvesters should receive a fair price for their fish on reasonable conditions; processors should receive a fair return on their investment while being able to focus more on innovative ways of growing and improving the fishery. The results should lead to more stable employment for fish plant workers on terms that provide them with dignity; a decent and stable income and quality of life in those places in the province where they live and work; with government and the people of this province being able to continue to enjoy the social and economic benefits that an invigorated fishery may bring.

Government has already acknowledged that innovation is needed to bring meaningful change to the province, and has formulated an action plan framework, the Strategic Social Plan (the

SSP) to facilitate this. According to various commentators, Newfoundland and Labrador's SSP leads the country in assisting in social policy development and incorporating communities' needs in the social and economic programs that affect them. In such an environment, and against such a backdrop then, it is in my opinion not only reasonable, but necessary to recommend a social compact for the fishing industry, to focus government's social and economic policy in this important sector, to take into account the business interests of fish harvesters and fish processors and their representatives in an industry that vitally affects them and all of us and to incorporate the stakeholders' needs. Such an agreement will strengthen the province's social infrastructure, help preserve our culture and way of life and impact greatly and positively upon this province's economy.

The single most important driving force behind this study, as stated in my Terms of Reference, was and is the need to identify and recommend measures that would enhance long-term labour relations stability in the fishery. During my consultations, it became clear that labour relations stability means different things to different people. For some, it means the timely opening of fisheries; for others, it means an absence of strikes (or cessation of business dealings by harvesters) or lockouts; for other persons, it means a strong working relationship between identifiable parties; and still for others, it means improvements in quality and returns to fish processors and fish harvesters in and from the marketplace. In fact, labour relations stability in the fishing industry is the achievement of that degree of harmony in the industry which will lead to all of the above.

As I understand the same, government's public policy objectives regarding the fishery are: ensuring optimum utilization of harvested fish, a common property resource; ensuring the maximum income, employment and socio-economic benefits from processing that resource in this province; achieving an equitable yet commercially practical distribution of this province's fish processing licenses; achieving some measure of regional balance in processing and economic activity in this province; and avoiding the creation of a corporate concentration of economic power in the industry in any one person or group to the detriment of the industry. Irrespective of the political stripe of the government over the last 30 years, from my study of history and the industry, I understand these principles to be the cornerstones and bedrock upon which we have built current fisheries policy and to be the ones on which we will go forward in the future. They are also principles which have broad support amongst fish harvesters, processors and plant workers.

In my opinion the time is now ripe for government and the industry to pursue the kind of discussion necessary to put in place a social compact so that the objectives set out above can continue to be met, only more effectively, with a view to achieving long-term labour relations peace in the fishing industry. Government's role should be to adopt the necessary measures and make the necessary regulatory changes to effect the agreement reached between the parties on the elements of the social compact. The question is how do we get there?

To date, while there is broad agreement regarding the tenor of this report among the industry, the principals of FANL make the proviso that the continuation of the model depends upon correcting what they perceive as an imbalance of bargaining power. Processing overcapacity has resulted in destructive competitive forces among processors, which was at the root of this year's crab production shutdown. Notwithstanding the model's usefulness in starting fisheries on time and providing valuable conflict resolution, processors regard threats to their margins, operational viability and future existence as important enough to abandon the model. For them, the answer to a viable fishery would be the introduction of production quotas in the crab industry, which is the engine that drives the fishing industry. They assert that apportioning quotas to each licensed processor would provide certainty among processors and for harvesters regarding the viability of the upcoming season.

It is a matter of public record that non-FANL processors and some fish harvesters strongly object to production quotas. I, too, would not support such a scheme, in isolation. In the context of a social compact, however, in company with other collateral benefits which would accrue to the parties involved, I support the concept in principle.

Based upon the summit which I held with FANL and the FFAW/CAW in August, and my subsequent discussions with major industry players since FANL's decision to fold, I understand that all parties still believe that there is merit in pursuing these deliberations. So strongly do I believe this that I would be willing to assist the parties through the Fall by acting as a facilitator for their individual and collective meetings on this topic should that be their wish.

The following are the elements that, with fish harvesters' and processors' agreement, should comprise a social compact to facilitate collective bargaining and rejuvenation in the fishing industry:

1. All of the other recommendations in this report should be implemented, unless all of the parties to the compact otherwise agree.

2. A production sharing arrangement should be established among all licensed processors of crab in this province that would identify specific production limits for specific crab

processors. These shares would be expressed as a percentage of the total harvest, and based upon a fair and transparent set of historical factors over a time period such as the last three years. A sharing arrangement would have to be based upon the agreement of at least 50 per cent of the persons holding processing licenses and representing at least 75 per cent of finished product production.

3. Government should implement the results of any agreed upon production sharing arrangement using the provisions of the *Fish Inspection Act* and the conditions to license issued under it.

4. To effect the purpose stated in item 3 above, government should amend the *Fish Inspection Act* to enable it to establish production sharing arrangements among individual licensed crab processors. This amendment would also set out the criteria used for establishing the respective production shares of each processor.

5. On being advised of their production shares, fish processors should have two weeks in which to communicate and set out the nature of any objection that they have to that share to the Minister of Fisheries and Aquaculture, with that Minister to make a determination on the validity of that objection and to make a final determination of the matter within one month of having received the same, which would then be effected with any necessary changes to the production shares on other licenses.

6. No processor should be entitled to process any amount of crab over and above the amounts provided for in the production sharing arrangements. Any processor that did would be have its processing license suspended and would be subject to a penalty which the *Fish Inspection Act* should be amended to provide for equivalent to the gross profit made on the processing of that illegally processed fish.

7. The province should be divided into regions: Labrador; the West Coast including Channel-Port aux Basques and Rose Blanche to and including the Bay of Islands; the South Coast excluding Channel-Port aux Basques and Rose Blanche to and including the Burin Peninsula; the Great Northern Peninsula; the Northeast Coast from White Bay to and including Gander Bay; the remaining East Coast from Gander Bay to the isthmus of the Avalon; and the Avalon Peninsula. Between these regions no license transfers would be permitted without Ministerial approval obtained in the manner outlined in #8 below; this would assure that regional balance of processing capacity is maintained.

8. Production shares within and between regions should only be transferable on the approval of the Minister of Fisheries and Aquaculture and only after that Minister had given all interested parties 30 days' notice of the request for a transfer, by advertisement, in which to comment. After this time, and in the best interests of the province, the Minister would make a binding decision.

9. In conjunction with industry, the Minister of Fisheries and Aquaculture should develop rules regarding the maximum degree of common ownership of any one entity or group of persons in the crab sector. For socio-economic reasons, no ownership should exceed 20 per cent of the total production shares established in the crab industry.

10. Processors whose purchases exceed their authorized production share should be required to ship the surplus to another processor who has not reached its production share for processing.

11. The industry, i.e., fish harvesters and fish processors, should establish a settling agency monitored by government to ensure transfers of crab over and above production shares are properly made.

12. Subject to any arrangement they may make, fish harvesters should continue to sell their catch to the buyer of their choice.

Based on my discussions with processors, elements #2-#11 are those elements which are necessary for them to voluntarily engage under a newly constituted industry association that would be set up for purposes of collective bargaining in next year's fishery.

It is my understanding that fish harvesters would support a production sharing arrangement if, and only if, a product of the social compact was what they perceive to be a fairer price for the fish they sell. No one here is advocating the end of bonus payments, simply a narrowing of the band of such payments so that the negotiated or arbitrated price is closer to the price that is ultimately paid. This is consistent with my earlier finding that bonus payments should be reserved for addressing situations of superior or value added performance. This would restore vigour and credibility to the bargaining process. It would again become more than just the opening shot that starts a fishery and sets the stage for individual processors and harvesters to set the real price of fish.

The means to do this, which I believe all are agreed upon for achieving a fair price, is by a change in the price-to-market formula for determining the relative shares and income that harvesters and processors receive for the crab they sell.

As I have previously noted, there is a need to address the plight of plant workers. As part of this social compact, processors would have to commit to take measures to grow the industry and to work with the union, where it is economically feasible, to extend the work periods and incomes of plant workers. Based on my discussions with the parties, I believe that fish harvesters and their union and fish processors are receptive to the adoption of such an approach.

Accordingly, I recommend that as part of their deliberations this Fall fish processors should consider the above noted matters and elements of the social compact that are laid out in this report. To assist fish processors in these discussions I am also recommending that government (the Departments of Labour and Fisheries and Aquaculture, jointly) should invite all processors to a forum in October, 2003 chaired by a facilitator acceptable to them, in which to consider and discuss these matters. As part of that forum, fish processors holding crab licenses would meet separately to discuss those matters germane to them as contained in my recommendations regarding a social compact.

If a bridgehead of success can be achieved on this front, and I believe that it can, then further parallel discussions should go on between these parties, the facilitator and the union, leading to the presentation of the results of these discussions for consideration by the union at its upcoming December, 2003 meetings. Obviously, and from my discussions with the leadership of the FFAW/CAW, the entry into a Social Compact is potentially a matter of such importance that the union may wish to take it to their members for a ratification vote in January of 2004. That of course is a matter for the union to decide; however, the time lines still available to the parties facilitate that opportunity.

I recommend that the above noted pilot project be instituted on a two year basis with opting out to obtain on terms similar to that contained in the Opting Out Section of this report. In any event, government should pass the necessary legislation by year's end to be in a position to enable a positive outcome on this file.

As I have determined them the benefits of a social compact would be:

1. improved planning ability for processors, leading to improvements in operational efficiency. Just as harvesters know their catch limits, their Individual Quotas (IQs),

and are able to rationally organize their harvesting activities, so fish processors will be able to rationally organize their fish processing activity to maximize the returns and benefits from a new price to market formula that establishes a fair price for crab;

2. balance in the industry and collaboration among the parties to negotiations to maximize potential market returns;
3. the opportunity to negotiate and continually achieve a fair price for crab and an opportunity for fish harvesters and processors, through their representative organizations, to achieve a fair price for other fish species they negotiate;
4. a continued and continuing collegial approach to improvements in quality and market positioning resulting in increased returns to harvesters, plant workers and processors, building on the successes we have already achieved in this area;
5. instant increased value in the fishing industry as production shares once established could be booked on fish processors' financial statements, making it easier for them to acquire the capital necessary to continue to improve their businesses through the introduction of new product lines and greater secondary production of raw material with increased employment benefits;
6. more stable levels of employment for fish plant workers;
7. the ability for fish processors and harvesters to focus on growing the size and value of the industry for their mutual benefits, rather than always competing and fighting with each other;
8. regional balance and protection for communities and businesses in rural parts of the province which are dependant upon the fishery; and
9. achievement of all of government's above noted policy objectives.

The above statement of benefits should be viewed and used as a litmus test for a formal evaluation of the efficacy and effectiveness of the Social Compact pilot project that I have proposed. A formal evaluation and review of the benefits of the Social Compact pilot project should be conducted in consultation with the industry and government by an independent third party towards the end of year two of the pilot project. In an earlier section I recommended an annual review of the collective bargaining model, by which the parties to collective bargaining may improve the process; this would be a useful forum for the parties to annually address challenges in the Social Compact and to identify possible solutions. This would also serve to inform the scheduled formal evaluation.

At the end of the day, if the parties cannot reach agreement among themselves on the elements of the Social Compact that I have proposed, government may have to determine whether or not in is in the provincial interest to institute elements of the Social Compact on its own.

Taking the above measures in the manner that I have proposed can and will lead to long-term labour relations stability in the fishing industry.

RECOMMENDATION #57: Government, the FFAW/CAW and fish processors should pursue discussions on the creation of a Social Compact to be put in place before the commencement of next year's fishing season that contains the 12 elements proposed in the body of this section.

RECOMMENDATION #58: To address the situation of plant workers, as part of the proposed social compact, processors should have to commit to take measures to grow the industry and to work with the union where it is economically feasible to extend the work periods and incomes of plant workers.

RECOMMENDATION #59: As an integral part of the process of negotiating and developing the social compact, fish processors should develop for submission to the FFAW/CAW a new price-to-market formula for crab, which would result in a fairer higher price for crab so that the price negotiated or arbitrated is closer to the actual price that is ultimately paid to fish harvesters, with the band of bonus payments being reduced, resulting in bonus payments being used to reward superior or some other acceptable condition of value added performance;

RECOMMENDATION #60: To assist fish processors in these discussions, government (the Departments of Labour and Fisheries and Aquaculture, jointly) should invite all processors to a forum in October, 2003 chaired by a facilitator acceptable to them, to consider and discuss these matters. As part of that forum fish processors holding crab licenses would meet separately to discuss those matters germane to them as contained in the *Towards a Social Compact* section of this report.

RECOMMENDATION #61: Provided the October forum referenced above produces positive results, a series of parallel discussions should go on between the parties, the facilitator and the union, leading to the presentation of the results of these

discussions for consideration by the union at its upcoming December, 2003 meetings.

RECOMMENDATION #62: Based on its deliberations at its annual general meeting in December, 2003, the union should decide whether it wishes to accept or reject the proposal developed by the fish processing sector in the Fall of 2003 or whether it wishes to take the matter of the proposed Social Compact's acceptance to its members for a ratification vote in January of 2004.

RECOMMENDATION #63: If agreed to by the union, fish processors and government, the proposed Social Compact should be instituted on a two year pilot project basis with the same opting out conditions to apply to it as those that pertain to opting out of the model.

RECOMMENDATION #64: As part of the annual review of the collective bargaining process by the parties (recommended in the Improving the Process section of this report) the parties to the Social Compact would be free to review the elements of the Social Compact and to suggest and make further improvements to the Social Compact, acting in concert with government or in their own right.

RECOMMENDATION #65: A formal evaluation and review of the benefits of the Social Compact pilot project should be conducted in consultation with the industry and government by an independent third party towards the end of year two of the pilot to determine: the socio-economic benefits including the employment, income and industry diversification benefits to all industry stakeholders, including fish harvesters, processors and plant workers; the growth of the industry that has resulted from the Social Compact's adoption; how it has affected the quality and marketability of Newfoundland and Labrador fish products; and how it has contributed to labour relations stability in the fishing industry.

RECOMMENDATION #66: If the parties cannot reach agreement among themselves on the elements of the Social Compact, government may have to determine whether or not it is in the provincial interest to institute elements of the Social Compact on its own.

GOVERNMENT'S ROLE

During the course of my hearings and deliberations a number of parties questioned the role of government and its involvement both with the fishing industry and the collective bargaining process in the fisheries of this province. Given our history, the value of the fishing industry to our economy, the place of the fishery in our culture, and its place in our future I can only state that I found such comments to be disingenuous.

Government has a vital and a critical role to play in working with industry to ensure that the quality of our fish is maintained and improved. It has a pivotal role to play, as long as current licensing policy is maintained, to ensure that government's objectives as outlined in the previous section of this report are achieved.

In of the fishing industry, government has an important role to play in ensuring that the necessary background conditions exist for there to be labour peace and harmony. It also has a role in establishing the legal framework necessary to achieve growth, labour relations peace and long-term labour relations stability. This is a role that it cannot and should not abdicate, since there is no other actor with the necessary legal authority to occupy that field.

Sometimes, when industry is at an impasse it is the role of government to lead the way and to implement measures that are in the public interest and for the general good of the industry, even if some or all members of the industry do not agree with it. Once the parties have had an opportunity to read, digest and act upon the content of this report, I trust that a role such as this, which is to be avoided if at all possible in a labour relations context, is not and will not become necessary.

One thing that government should not become involved in, except to the extent that some law of provincial general application is broken, is in enforcing or policing collective agreements in the fishing industry. That is properly a matter for the parties.

Rather, government should only be involved in this process to the extent that it provides those facilitation and other services that the parties to negotiations request and that the current and amended final offer selection model, that I have proposed, provide for the parties' mutual benefit.

In my opinion, at this point in our history, the best thing that government can do to promote the common good and to advance the interests of this industry is to accept the recommendations of this report and work constructively with the parties concerned to achieve their implementation for the benefit of the industry as a whole and all of our people.

Summarily, my concluding recommendations on the subject of government's role in promoting long-term labour relations stability are as follows.

RECOMMENDATION #67: Government should not interfere in the collective bargaining process and should leave it to the respective parties to enforce collective agreements against each other. Government should only intervene if some provincial law of general application is broken by a party to a collective agreement or other fishing industry player.

RECOMMENDATION #68: Government should continue to provide to the parties to negotiation of a collective agreement those facilitation and other services and legislative and regulatory supports that they requested and require, consistent with provincial government policy, necessary to enable them to negotiate and reach binding collective agreements under the final offer selection model as it exists today and will exist after the recommendations contained in this report are implemented.

RECOMMENDATION #69: Government should continue through the vehicles of the *Fishing Industry Collective Bargaining Act*, the *Labour Relations Act* and the *Fish Inspection Act*, the Fish Inspection Regulations and government policy to provide support and where necessary leadership to the fishing industry so that long-term labour relations stability may be achieved.

RECOMMENDATION #70: To eliminate any uncertainty in the industry, government should adopt and maintain consistent and clear regulatory and licencing policies both before and after the structural review of the industry that Mr. Eric Dunne will be completing by December 15, 2003.

RECOMMENDATION #71: Government should fully implement the recommendations contained in this report, except to the extent that the parties and government otherwise mutually agree.

CONCLUSION

"The current state of the fishery...strikes at the heart of our place in Canada."
- Excerpt from "Our Place in Canada", page 103

It is our nature, as the youngest province in Canada, to ponder about our place in this vast country. Ironically, at the same time as Confederation was debated, in the late 1940s, the state of the fishery and its place in our economy and our culture was also under scrutiny. Fifty-four years later the same questions are being asked.

Mine is not now the task of advising the Province of Newfoundland and Labrador on how to strengthen federal-provincial ties. Mine is, however, the task of advising this province that the fishing industry has survived the interim decades and is now thriving in a more stable economy and a more stable labour relations environment than it has been in at many points in our history.

The *Fishing Industry Collective Bargaining Act* has not failed and does not now fail the industry parties, those who negotiate fish prices. Through it and the various opportunities to examine its efficacy, government has provided a framework for stability in the industry. That this framework may be strengthened should not be an indicator that it is faulty; rather the parties using it and the industry in which it is employed have evolved, and the framework must evolve with it. That is healthy, and should be encouraged.

Once again, it has been my pleasure to work with the men and women of the fishing industry. I sincerely hope that the content of this report, when matched with the reason, intelligence, ingenuity and effort of government and of the people of the fishing industry, will pave the way for long-term labour relations stability in the fishing industry.

APPENDIX 'A': MEDIA RELEASE

NLIS 6
March 11, 2003
(Labour)
(Fisheries and Aquaculture)

Consultant appointed to review the *Fishing Industry Collective Bargaining Act*

Percy Barrett, Minister of Labour, today announced the appointment of David W. Jones, Q.C., to perform an independent review of the *Fishing Industry Collective Bargaining Act* (FICBA).

"I am certain Mr. Jones, who currently serves as the High Sheriff of Newfoundland and Labrador, will do an excellent job conducting the review," said Minister Barrett. "His considerable experience with the fishing industry, having served as legal and general counsel to the Department of Fisheries and Aquaculture and the Premier''s Task Force on Crab/Fish Settlement Prices, provides him with invaluable insight into the particulars of the industry and will aid in his discussions with various stakeholders. This review fulfills the commitment made by government when it announced changes to the FICBA last Fall."

The purpose of the review is to examine the current law and practice in relation to collective bargaining in the harvesting sector of the Newfoundland and Labrador fishing industry and related matters, and to recommend measures that will enhance long-term labour relations stability in the sector. A key component of the review process will be consulting with relevant fishing industry stakeholders.

The FICBA was first proclaimed in 1971 and substantially changed in 1998 to provide a legislative framework for the final offer selection collective bargaining regime. During the review process, Mr. Jones will obtain input from stakeholders to enable him to make recommendations regarding the effectiveness of the *Act* and the final offer collective bargaining model in regulating collective bargaining in the fishing industry.

Minister of Fisheries and Aquaculture Yvonne Jones said: "Government committed to undertaking a comprehensive review of the act in December of 2002. The appointment of Mr. Jones reflects our commitment to this process and to ensuring the work is of the highest caliber. It is our hope the review can be completed in a timely manner and I am confident the outcome will help ensure a stable labour relations environment in the fishing industry for years to come."

Mr. Jones will report to government by June 20, 2003.

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APPENDIX 'B': LIST OF CONTRIBUTORS

1. VINCE ANDREWS, Department of Fisheries and Aquaculture
2. DAVID ALCOCK, Arbitrator
3. TOM BEST, Petty Harbour Fishermen's Producers Co-Operative Society Ltd.
4. GLENN BLACKWOOD, Marine Institute of Newfoundland and Labrador
5. BILL BRODERICK, Fish Harvester
6. IAN BURFORD, Department of Fisheries and Aquaculture
7. GERARD CHIDLEY, Fish Harvester
8. HERB CLARKE
9. DENNIS COATES, St. Anthony Seafoods Limited Partnership
10. MORGAN COOPER, Arbitrator
11. EDWARD CURTIS, Fish Harvester
12. LESLIE J. DEAN
13. DAVID DECKER, Secretary/Treasurer, FFAW/CAW
14. HERB EBSARY, Facilitator, Department of Labour
15. HON. JOHN EFFORD, Member of Parliament, Bonavista-Trinity-Conception
16. GEORGE FELTHAM, Fish Harvester
17. WAYNE FOWLER, Director, Labour Relations Division, Department of Labour
18. DON GRAHAM, Aqua Fisheries Limited
19. JEFF GREEN, Discovery Economic Development Board
20. MIKE HANDRIGAN, Department of Fisheries and Aquaculture
21. GARY HEARN, Independent Fish Producers of Newfoundland and Labrador, Ltd./Peerless Fish Company Limited
22. ED HUSSEY, Tavel Limited
23. RANDY JANES, P. Janes & Sons Ltd.
24. EARL JOHNSON, Fish Harvester
25. GEORGE JOYCE, Assistant Deputy Minister, Department of Labour
26. JOE KENNEDY, Department of Fisheries and Aquaculture
27. GILBERT LINSTEAD, Labrador Fishermen's Union Shrimp Company, Ltd.

28. AIDEN MALONEY
29. EARLE MCCURDY, President, FFAW/CAW
30. MADONNA MOSS, Happy Adventure Sea Products (1991) Ltd.
31. DOUG NORMAN, Doug Norman and Sons Limited
32. JIM OAKLEY, Arbitrator
33. JOE O'NEILL, Deputy Minister, Department of Labour
34. ALASTAIR O'RIELLY, President, Fisheries Association of Newfoundland and Labrador
35. JOHN PEDDLE, Newfoundland And Labrador Employers' Council
36. ROSS PETERS, Arbitrator
37. DEREK PHILPOTT, Quin-Sea Fisheries Limited
38. LARRY PINKSEN, Fish Harvester
39. Public Meeting, Plum Point, May 25, 2003
40. Public Meeting, L'Anse Au Clair, May 26, 2003
41. Public Meeting, Mary's Harbour, May 27, 2003
42. Public Meeting, Cartwright, May 28, 2003
43. Public Meeting, Channel-Port Aux Basques, May 29, 2003
44. HEDLEY RICHARDS, Fish Harvester
45. GRAHAM ROOME, Fishery Products International Limited
46. Roundtable Meeting, St. John's, August 4, 2003
47. MIKE SAMPSON, Deputy Minister, Department of Fisheries and Aquaculture
48. DR. JOHN SCOTT, Arbitrator
49. KARL SULLIVAN, The Barry Group of Companies
50. MARTIN SULLIVAN, Fisheries Association of Newfoundland and Labrador/Grand Atlantic Incorporated/Sea Crest Corporation of Canada Limited
51. MARILYN TUCKER, Newfoundland and Labrador Employers' Council
52. DAVID VARDY, Arbitrator
53. KEVIN WADMAN, Avalon Ocean Products
54. FRED WOODMAN, JR., Woodman Sea Products Limited/Higdon's Sea Products Limited

APPENDIX 'C': ARBITRATION DECISIONS

Species for which collective agreements have been negotiated or arbitrated are: cod, capelin, lump roe, shrimp, squid, catfish, pollack, blackback flounder, herring and crab. Crab has been the economically most important species to this province and to the industry. In 2002, the terms of the Memorandum of Understanding between FANL and the FFAW/CAW also had to be negotiated. Details of the various species arbitrations are set out below by year.

1998

Species	**Settlement**
Crab	Settled by arbitration - Morgan Cooper selected ***final offer*** of the FFAW/CAW.
Shrimp	Collective Agreement achieved through ***negotiations.***
Lump Roe	Settled by arbitration - James Oakley selected the ***final offer*** proposal of the FFAW/CAW, (the only offer submitted.)
Capelin	Settled by arbitration - Dr. G. Ross Peters selected the ***final offer*** proposed by FANL.
Cod	Initially, an interim price was established by the arbitrator James Oakley in favour of FANL's ***final offer*** submission. The Fall season price for cod was achieved through ***negotiations*** and ***with the assistance of the arbitrator*** as both parties' final offers contained the same price offer.
Squid	Settled by arbitration - Dr. G. Ross Peters selected the ***final offer*** proposal from the FFAW/CAW.

1999

Species	**Settlement**
Crab	Settled by arbitration - W. John Clarke selected the ***final offer*** proposal of FANL.
Shrimp	Initial collective agreement (with a price re-opener option) achieved through ***negotiations***. Price re-opener initiated by FANL on August 5, 1999, settled by arbitration. Dr. J. Scott selected the ***final offer*** proposal of the FFAW/CAW.
Lump Roe	Collective agreement achieved through ***negotiations.***
Capelin	Collective agreement achieved through ***negotiations.***
Cod	Interim price settled by arbitration - James Oakley selected the ***final offer*** of FANL. This price settlement was valid only to the end of August 1999. 3Ps fishery closure - dispute mechanism initiated by FANL on July 30, 1999. Arbitrator, James Oakley, ***ruled in favour*** of FANL to maintain closure. Fall price (Sept 1 - Dec 31, 1999) settled by arbitration - James Oakley selected ***final offer*** of the FFAW/CAW.
Squid	Collective agreement achieved through ***negotiations.***

In 1999 an additional arbitration decision was required by an arbitrator for cod. The arbitrator chose FANL's final position.

2000

Species	**Settlement**
Crab	Collective agreement achieved through ***negotiations.***
Shrimp	Settled by arbitration - Howard Noseworthy selected the *final offer* proposal of the FFAW/CAW.
Lump Roe	Settled by Arbitration - Dr. R. Peters selected the FFAW/CAW final offer.
Capelin	Collective Agreement achieved through ***negotiations***.
Cod	Summer cod price agreement was achieved through ***negotiations***, while Spring prices and Fall/Winter prices were achieved through arbitration where in each case James Oakley selected the ***final offer*** proposal of FANL.
Squid	Collective Agreement achieved through ***negotiations***.

2001

Species	Settlement
Crab	Collective agreement achieved through ***negotiations.***
Shrimp	Collective agreement for Shrimp price to June 30/01 achieved through ***negotiations***. Collective Agreement from the end of June to the end of August was achieved through ***negotiations.***(Fishery closure) Maintained Spring prices. September to end of season shrimp price negotiations were achieved through arbitration. Arbitrator David Vardy selected the ***final offer*** of FANL. The parties mutually agreed to continue negotiations and agreed upon a higher price.
Lump Roe	Collective agreement achieved through ***negotiations.***
Capelin	Collective agreement achieved through ***negotiations.***
Cod	Spring/Summer cod prices to June 30/01. Agreement was achieved through arbitration. James Oakley selected the ***final offer*** proposal of the FFAW/CAW. Summer & Fall/Winter cod prices to the end of the season were achieved through arbitration. James Oakley selected the ***final offer*** of FANL which will cover the prices for the balance of the year, with a Fall market adjustment for the Fall/Winter Fishery.
Squid	Collective agreement achieved through ***negotiations.***
Catfish	Collective agreement achieved through ***negotiations.***
Pollock	Settled by Arbitration - Dr. Ross Peters selected the ***final offer*** of the FFAW/CAW.
Black Back Flounder	Settled by Arbitration - Dr. Ross Peters selected the ***final offer*** of the FFAW/CAW.
Herring	Settled by Arbitration - Dr. Ross Peters selected the ***final offer*** of FANL.
Mackerel	Negotiations were not necessary.

In 2001 an additional arbitration decision was required by an arbitrator for blackback flounder. The arbitrator's decision was in favour of the FFAW/CAW position.

2002

Species	Settlement
Cod	Spring/Summer cod prices interim price to June 30/02. Agreement was achieved through arbitration. James Oakley selected the ***final offer*** proposal of the FFAW/CAW. Summer & Fall/Winter cod prices to the end of the season were achieved through arbitration. James Oakley selected the ***final offer*** of FANL which will cover the prices for the balance of the year.

In 2002, for the first time, the Memorandum of Understanding required under the FISHING INDUSTRY COLLECTIVE BARGAINING ACT could not be achieved between the parties and an arbitrator's decision was required. The arbitrator selected the FFAW's final position.

2003

Species	Settlement
Crab	Settled by arbitration - David Vardy selected the ***final offer*** proposal of FANL.
Shrimp	Spring price settled by arbitration - Art May selected the ***final offer*** proposal of FFAW/CAW. Summer price settled by negotiation. Fall price settled by arbitration.
Lump Roe	Collective agreement achieved through ***negotiations.***
Cod	Spring Price settled by negotiation Summer/Fall price settled by arbitration - Jim Oakley selected the ***final offer*** proposal of FANL.
Pollock	Collective agreement achieved through ***negotiations.***
Black Back Flounder	Collective agreement achieved through ***negotiations.***

In 2003, prior to FANL's re-entry to negotiations, the FFAW/CAW identified three processing companies for fish price negotiations. Arbitrators were appointed for the establishment of the following Memorandums of Understanding.

Company	Arbitrator	Decision
Fishery Products International	David Vardy	FFAW/CAW
Beothuck Fish Processors	David Vardy	FFAW/CAW
Grand Atlantic Fisheries Ltd.	Wayne Thistle	FFAW/CAW

A decision on the FANL and FFAW/CAW 2003 Memorandum of Understanding was also made by arbitrator David Vardy, who selected the FANL final offer.

APPENDIX 'D': REFERENCE MATERIALS

1. An Evaluation of the Fishing Industry Collective Bargaining Act Pilot Project, November 3, 1999: Howard Noseworthy, Consultant.

2. Maritime History Archives, Memorial University of Newfoundland, 2003. Website: wysiwyg://3/http://www.mun.ca/mha/holdings/business.php

3. New Beginnings: Bringing Stability and Structure to Price Determination in the Fishing Industry , Report of the Task Force on Fish/Crab Price Settlement Mechanisms in the Fishing Industry Collective Bargaining Act, January 15, 1998: Panel chaired by David Vardy.

4. New Century, New Realities: Creating a Framework Together Report of the Labour Relations Working Group of the Advisory Council on the Economy, November, 1996.

5. Our Place in Canada, June 30, 2003, Report of the Royal Commission on Renewing and Strengthening Our Place in Canada: Panel chaired by Victor Young.

6. Report of The Special Panel on Corporate Concentration in the Newfoundland and Labrador Fishing Industry, November 15, 2001: Panel chaired by Leslie J. Dean.

7. Review of the Cooked and Peeled Shrimp Industry, April, 2002: Panel chaired by David Vardy.

SUMMARY OF RECOMMENDATIONS

#1: Continue using the final offer selection collective bargaining model for another two-year period with the modifications and improvements to it recommended in this report.

#2: Amend the definition of fish in the *Fishing Industry Collective Bargaining Act* to mirror that in sub-section 2(d) of the *Fish Inspection Act*, which reads: "fish" includes shellfish and crustaceans, and marine animals, and parts, products or by-products of them.

#3: There should be no change in the manner and method of arbitration used by the parties unless they mutually agree upon such a change, and section 35.7 of the *Act*, which makes provision for such a process, should not be altered.

#4: Hold an annual meeting involving the parties, and all arbitrators and facilitators for that year, in October, to examine activity throughout the season's collective bargaining to suggest improvements to the model, to posit solutions to challenges identified by the parties and to assist the parties and government in addressing problems and designing changes that will enhance or improve collective bargaining in the fishing industry.

#5: A facilitator should be selected by the parties to act as chairperson of this meeting and to record and forward a report summarizing the observations, findings and recommendations of this meeting to the Ministers of Labour and Fisheries and Aquaculture, for any requested action as appropriate.

#6: Amend the *Fishing Industry Collective Bargaining Act* to give the Minister of Labour the authority to appoint a facilitator no later than 15 days prior to the filing of an MOU should the parties to negotiations fail to recommend one to the Minister as the *Act* provides.

#7: Government should continue to support the model by paying the cost of the arbitration and facilitation services required to operationalize it.

#8: Joint technical committees should meet in October immediately after the meeting of facilitators, arbitrators and the parties has occurred, to examine technical issues arising from the past fishing season and to deal with anticipated issues in the upcoming season.

#9: Amend the *Fishing Industry Collective Bargaining Act* to recognize that a collective agreement, for the purposes of the *Act*, may comprise a combination of a master collective agreement and a price schedule and other schedules pertaining to a particular species.

#10: Amend the *Fishing Industry Collective Bargaining Act* to give the Minister of Labour the right, by regulation, to establish a framework for the terms and conditions of the final offer selection collective bargaining model after December 31st at the request of a party to negotiations when one of the parties to the previous year's MOU ceases to participate in the process.

#11: Amend the *Fishing Industry Collective Bargaining Act* to create a bridging mechanism similar to that commonly used in collective agreements that would provide that where the parties to the previous year's MOU fail to execute a new MOU for the upcoming year by December 31st, the MOU between the parties for the previous year would automatically roll over.

#12: Amend the *Fishing Industry Collective Bargaining Act* to require that: 1. the parties to a collective agreement containing a re-opener clause should establish a schedule for any such re-opener clause or clauses and to advise the Minister of Labour of that schedule; 2. The time frame established in a re-opener clause schedule should be such as to ensure that no cessation of business dealings occurs in a fishery during negotiation of a re-opener; 3.The arbitrator and facilitator used during negotiations of a species should be the same for negotiation of a re-opener for that species, unless the parties otherwise mutually agree; and 4. The default person named by the parties or the Minister of Labour under section 35.5 of the *Act* should establish a time frame for negotiations of a re-opener, if the parties fail to do so, but in any event, this time frame should not exceed seven days.

#13: Amend the *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* to provide access to the Board for any party wishing to determine the binding effect of a collective agreement in the fishing industry.

#14: Amend the *Fishing Industry Collective Bargaining Act* to allow the Minister of Labour, at the request of either party to a collective agreement, to appoint an arbitrator to resolve an outstanding grievance. To ensure arbitrators possessed of the necessary fishing industry expertise, the arbitrator should be chosen from a panel of three arbitrators presented to the Minister of Labour by the parties to negotiations. Should the parties to negotiations fail to name such a panel, the default person should be possessed with that authority. The arbitrator's decision should be rendered within seven days of his or her appointment. Lastly, the arbitrator's decision should be immediately capable of being filed with the Supreme Court of Newfoundland and Labrador, Trial Division, and enforceable 48 hours after doing so. Furthermore, any party to a binding collective agreement should be enabled, by the amended legislation, to file a grievance against a rogue party not honouring a collective agreement. This provision should enable a processor or processors' organization to file a grievance against another processor, a fish harvester, or a union bound by a collective agreement, and vice versa.

#15: An order or determination of the Board made in respect of a labour relations matter arising under the *Fishing Industry Collective Bargaining Act* should be immediately capable of being filed by a party to a hearing before that board as a judgment of the Supreme Court of Newfoundland and Labrador, Trial Division and enforceable 48 hours after such filing without any further waiting period, and government should make the necessary amendments to the *Labour Relations Act* and the *Fishing Industry Collective Bargaining Act* to make this so.

#16: Sections 18.1, 90, 123 and 124 of the *Labour Relations Act* which deal with the enforceability of collective agreements and arbitration decisions, unlawful strikes and lockouts and the determination of rights flowing from an unfair labour practice or breach of a collective agreement that is binding on a party should be incorporated by reference and added to the *Fishing Industry Collective Bargaining Act*. Furthermore, eliminate the 14-day waiting period currently contained in section 90, and make a Board order capable of being filed by a party to a hearing as a judgment of the Supreme Court of Newfoundland and Labrador, Trial Division, and enforceable 48 hours after such filing. Lastly, enable the Board to issue interim cease and desist orders regarding unlawful strikes and lockouts.

#17: Government should establish a special panel of the Board with expertise in fishery and labour relations issues to deal with any and all labour relations matters where the Board is called upon to make a decision relative to the *Fishing Industry Collective Bargaining Act*.

#18: The *Fishing Industry Collective Bargaining Act* should not be amended to permit the accreditation of a fish processors' organization on a single species basis.

#19: Section 13.7 of the *Fishing Industry Collective Bargaining Act* should be amended to only permit raiding of a certified bargaining agent or an accredited processors' organization during the same time period that I have proposed for electing to opt out of the model, namely November 1 through December 31 of the second year of a two year cycle.

#20: If it wishes to be accredited as a processors' organization FANL or any other organization should have to meet legal tests as set out in the *Fishing Industry Collective Bargaining Act* as the union did to the satisfaction of the Board. Neither FANL nor any other organization should be written into the legislation as an accredited processors' organization.

#21: There should be no change in the threshold production level required to make a collective agreement binding on all processors of a species.

#22: Amend the *Fishing Industry Collective Bargaining Act* to permit a group of processors, or a processors' organization representing a majority of the finished product weight of a given fish species based on the previous calendar year's production, to give notice of intent to engage in collective bargaining for a given species to a bargaining agent representing the harvesters.

#23: Revise the opting out provision to enable this action to occur from November 1 through December 31 of the second calendar year of each two-year rotation.

#24: Institute a one-year cooling off period after opting out, to provide sufficient time to repair relationships, address issues with the model, and amend the legislation, as may be necessary, unless unanimous government and party consent exists to its sooner ending.

#25: The *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* should be amended to provide for the creation of a registered industry association to represent all fish processors in this province.

#26: The *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* should be amended so that the trigger for the request to create an industry association should be a request based on last year's finished product by weight of fish processors who represent a majority of the production in the previous year.

#27: The amended legislation should allow Her Majesty's Executive Council for Newfoundland and Labrador, by order, to create such an organization once it has been satisfied that the above test has been met and that its constitution meets the criteria set out in the amended legislation.

#28: The *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* should be amended so that they contain (1) provisions vesting the employers' organization with the exclusive authority to negotiate, enter into and administer collective agreements; (2) provisions for the election or appointment of officers of the employers' organization;(3) a formula for reaching decisions of the employers' organization that assures a deadlock cannot occur.

#29: The *Fishing Industry Collective Bargaining Act* and the *Labour Relations Act* should be amended so that they contain provisions: (1) that require the mandate of the employers' association only extends to matters related to the negotiation or enforcement of collective agreements and that fees are only chargeable to members in respect of such purposes; (2) that requires the employers' association to provide a schedule to its members and the Minister of Labour of all such fees and an accounting showing that they only relate to expenses related to the negotiation or enforcement of a collective agreement; (3) that enables the association to provide the Minister of Labour with a list of those who fail to pay any properly assessed fee 30 days after they become delinquent and enables the Minister to issue a certificate which the association may the file with the Supreme Court of Newfoundland and Labrador, Trial Division as a judgment, register with the Sheriff's Office and collect; and (4) that makes fees based on per species negotiation payable by all members who are licensed to process that species.

#30: The *Fishing Industry Collective Bargaining Act* should be amended to include a provision like that contained in Subsection 51(1) of the New Brunswick *Industrial Relations Act* so as to establish a duty of fair representation of members by a registered industry association and by the certified bargaining agent for fish harvesters.

#31: The *Fishing Industry Collective Bargaining Act* should be further amended to provide members of the certified bargaining agent for fish harvesters and an employers' association access to the Board in a case where there was an allegation by a member of an organization of a breach by that organization of a duty to represent that member fairly.

#32: The amended legislation should provide that once a registered industry organization is created pursuant to #27, section 13.1 of the *Fishing Industry Collective Bargaining Act* which provides for the creation of an accredited processors' organization should be suspended while a duly constituted registered industry organization is in place and the role of any then accredited processors' organization should be supplanted by the new registered industry organization.

#33: Section 13.7 of the *Fishing Industry Collective Bargaining Act* should be amended to only permit raiding of a registered industry association during the same time period that I have proposed for electing to opt out of the model, namely November 1 through December 31 of the second year of a two year cycle.

#34: Government should amend the legislation to facilitate an auction system, to be piloted in 2004 in the west coast lobster fishery, and to be overseen by a committee jointly representing fish harvesters and processors.

#35: Government should not legislate to limit or outlaw the making of bonus payments or to regulate the amounts of bonus payments that fish processors may pay to fish harvesters.

#36: Government should leave it to the parties, if they choose to do so, to negotiate the level of bonus payments and how they will be distributed between fleet sectors.

#37: If the parties wish to achieve trust and long-term labour relations stability, they should negotiate a price for fish that more properly reflects its true value as between fish harvesters and processors, and only use bonus payments to reward superior or value-added levels of performance and then only at levels that no longer form a substantial component of the price of fish.

#38: If the parties wish to achieve trust and long-term labour relations stability and to maximize the economic benefits and returns of the industry to fish processors, fish harvesters , plant workers and the people of this province, government and the parties should consider and pursue the Social Compact approach outlined in the Towards a Social Compact section of this report.

#39: The level of fines provided for in the *Fishing Industry Collective Bargaining Act* should be increased to at least the levels contained in the *Labour Relations Act*. Specifically: (a) that the level of fine for engaging in an illegal lockout as provided for in section 38 of the *Fishing Industry Collective Bargaining Act* be raised to $1.000 for each day that the illegal lockout exists for each employer or employers organization that declares, causes or participates in an illegal lockout for each day that it exists; (b)that any person acting on behalf of an employer's organization engaged in such activities would be liable to the fine not exceeding $10,000; (c) that a similar provision be introduced covering strikes and that the level of fine for engaging in an illegal strike as provided for in section 39 of the *Fishing Industry Collective Bargaining Act* be raised to $1,000 for each day that the illegal strikes for any trade union or council of trade unions that declares, causes or participates in an illegal strike for each day that it exists; (d) that any person acting on behalf of a union or council of trade unions organization engaged in such activities , would be liable to the fine not exceeding $10,000, as would any fish harvester that participated in the same; (e) that the fine provided for in section 37 of the *Act* for a processor, person, association, or processors' organization engaging in an unfair trade practice be raised to a maximum of $1,000 in the case of an individual and $10,000 in the case of a corporation, association or processors' organization; (f) that the provision contained in that section 37 enabling a provincial court judge to order a processor to pay compensation to a fisher not exceeding the profit that the judge determined would have accrued to the fisher to the date of the conviction for the violation be retained but the cap of $200 contained in it be removed; (g)that a similar provision be added to that referenced in paragraph (f) hereof providing for similar penalties for a fish harvester, a union or a council of trade unions engaging in an unfair labour practice with a similar provision enabling a provincial court judge to order a fisher to pay compensation to a processor not exceeding the profit that the judge determined would have accrued to the processor to the date of the conviction but for the violation to be added to the *Act*; (h) that the general penalties provided for in section 39 of the *Act* be raised in the case of an individual to a fine not exceeding $1,000, and in the case of a corporation, association, or processors' organization to a fine not exceeding $10,000 with a union or council of trade unions to be added to this category; (i) that the fine for an association or person other than an association engaging in a prohibited act under section 40 of the *Act* be raised to a level not exceeding $10,000 and in the case of an individual engaged in such acts be raised to a maximum of $1,000; (j) that the level of fine for a processor and every person acting on behalf of a processor who alters a rate of pay for fish or another term or condition of a collective agreement contrary section 36 of the *Act* be changed and raised to $5,000 per day, from the lesser of $5 per harvester or $250 per day.

#40: In consultation with industry, government should complete a review of the *Fish Inspection Act* and regulations, with a view to repealing outdated and unduly prescriptive regulations, and focus on amending and strengthening laws, regulations, policies and practices which improve quality outcomes.

#41: To the extent it does not conflict with the above or the existing province's licencing policy and in-province processing requirements, government should amend the provisions of the *Fish Inspection Act* and the Fish Inspection Regulations and harmonize them with the regulations maintained by the Canadian Fish Inspection Agency regarding the processing of fish as a food product.

#42: To the extent that they have not already been implemented, government should take all necessary steps and measures to implement the quality recommendations contained in the Vardy Task Force and the Shrimp Panel reports, unless alternate acceptable or better measures can be found.

#43: The province should adopt a risk management approach to dealing with quality related problems in the fishing industry and employ progressive fines and penalties; with sanctions meted out by the Minister of Fisheries and Aquaculture including the temporary, and if necessary, permanent suspension of an offender's fish processing license(s).

#44: Inspectors employed by the Department of Fisheries and Aquaculture should continue to be deployed in plants and on wharves and in other strategic locations throughout the province to inspect fish landed in this province that is to be processed here. They should be deployed in vessels and on docks, during transport and at all stages of production, including the final pack mix stage, to ensure that the quality measures advocated in this report are achieved.

#45: Government should amend the *Fish Inspection Act* to enable the Minister of Fisheries and Aquaculture, by ministerial order having the force of a regulation, to adopt those quality measures agreed upon by fish harvesters and fish processors as a result of the negotiation or arbitration of a collective agreement binding on the whole industry under the *Fishing Industry Collective Bargaining Act* so as to make such measures applicable and binding on the entire fishing industry in this province.

#46: Government should amend the *Fish Inspection Act* to make provision for the licensing and appointment of fish graders, irrespective of their employer, to provide for their independence, and to make it an offence under the *Fish Inspection Act* to interfere with, attempt to interfere with, intimidate or attempt to intimidate a fish grader.

#47: On the advice of the parties to collective bargaining, the Minister of Fisheries and Aquaculture should adopt in regulation standards for the licensing of fish graders, failing which advice the Minister should establish such standards.

#48: All fish graders and any person or organization selected by the fishing industry for grading purposes under a collective agreement should be licensed for such purpose by the Minister of Fisheries and Aquaculture.

#49: Amend the *Fish Inspection Act* to give the Minister of Fisheries and Aquaculture the authority to appoint fish graders should the industry fail to recommend fish graders to the Minister of Fisheries and Aquaculture for appointment.

#50: The amended Fish Inspection Regulations should provide that any dispute regarding the activities of graders should be referred in the first instance to a panel composed of processor and fish harvester representatives, for discussion and resolution, with the Minister of Fisheries and Aquaculture retaining the residual ability to determine the matter in the absence of such a panel or if the parties cannot reach agreement.

#51: Government and industry should investigate to determine if employment insurance regulations may be changed and/or programs of general assistance established in concert with the federal government to help address the plight of plant workers caused by the lack of work resulting from this year's resource reductions.

#52: As part of the structural review of the industry that is now taking place, the issue of equitable distribution of wealth from our fisheries and the qualifying period and programs that may assist plant workers should be addressed.

#53: Industry and government should consider adopting the social compact approach that I advocate in a succeeding section of this report as a way of maximizing social and economic benefits to processors, fish harvesters, plant workers and the people of the province in general.

#54: The parties should consider biological imperatives and regional differences in biological imperatives and allow these to dictate scheduling of negotiations, in order to ensure that all available fish is harvested in the best condition and in the best possible manner.

#55: Government and the parties to negotiations should encourage the federal government to settle resource management issues as early as possible, but by no later than mid-February of each year, to provide harvesters and processors sufficient time to prepare operations for their respective seasons.

#56: Government and the parties to negotiations should encourage the Department of Fisheries and Oceans to continue to implement resource management measures agreed to through negotiation or arbitration of a collective agreement for a species.

#57: Government, the FFAW/CAW and fish processors should pursue discussions on the creation of a Social Compact to be put in place before the commencement of next year's fishing season that contains the 12 elements proposed in the body of this section.

#58: To address the situation of plant workers, as part of the proposed social compact, processors should have to commit to take measures to grow the industry and to work with the union where it is economically feasible to extend the work periods and incomes of plant workers.

#59: As an integral part of the process of negotiating and developing the social compact, fish processors should develop for submission to the FFAW/CAW a new price-to-market formula for crab, which would result in a fairer higher price for crab so that the price negotiated or arbitrated is closer to the actual price that is ultimately paid to fish harvesters, with the band of bonus payments being reduced, resulting in bonus payments being used to reward superior or some other acceptable condition of value added performance;

#60: To assist fish processors in these discussions, government (the Departments of Labour and Fisheries and Aquaculture, jointly) should invite all processors to a forum in October, 2003 chaired by a facilitator acceptable to them, to consider and discuss these matters. As part of that forum fish processors holding crab licenses would meet separately to discuss those matters germane to them as contained in the *Towards a Social Compact* section of this report.

#61: Provided the October forum referenced above produces positive results, a series of parallel discussions should go on between the parties, the facilitator and the union, leading to the presentation of the results of these discussions for consideration by the union at its upcoming December, 2003 meetings.

#62: Based on its deliberations at its annual general meeting in December, 2003, the union should decide whether it wishes to accept or reject the proposal developed by the fish processing sector in the Fall of 2003 or whether it wishes to take the matter of the proposed Social Compact's acceptance to its members for a ratification vote in January of 2004.

#63: If agreed to by the union, fish processors and government, the proposed Social Compact should be instituted on a two year pilot project basis with the same opting out conditions to apply to it as those that pertain to opting out of the model.

#64: As part of the annual review of the collective bargaining process by the parties (recommended in the Improving the Process section of this report) the parties to the Social Compact would be free to review the elements of the Social Compact and to suggest and make further improvements to the Social Compact, acting in concert with government or in their own right.

#65: A formal evaluation and review of the benefits of the Social Compact pilot project should be conducted in consultation with the industry and government by an independent third party towards the end of year two of the pilot to determine: the socio-economic benefits including the employment, income and industry diversification benefits to all industry stakeholders, including fish harvesters, processors and plant workers; the growth of the industry that has resulted from the Social Compact's adoption; how it has affected the quality and marketability of Newfoundland and Labrador fish products; and how it has contributed to labour relations stability in the fishing industry.

#66: If the parties cannot reach agreement among themselves on the elements of the Social Compact, government may have to determine whether or not it is in the provincial interest to institute elements of the Social Compact on its own.

#67: Government should not interfere in the collective bargaining process and should leave it to the respective parties to enforce collective agreements against each other. Government should only intervene if some provincial law of general application is broken by a party to a collective agreement or other fishing industry player.

#68: Government should continue to provide to the parties to negotiation of a collective agreement those facilitation and other services and legislative and regulatory supports that they requested and require, consistent with provincial government policy, necessary to enable them to negotiate and reach binding collective agreements under the final offer selection model as it exists today and will exist after the recommendations contained in this report are implemented.

#69: Government should continue through the vehicles of the *Fishing Industry Collective Bargaining Act*, the *Labour Relations Act* and the *Fish Inspection Act*, the Fish Inspection Regulations and government policy to provide support and where necessary leadership to the fishing industry so that long-term labour relations stability may be achieved.

#70: To eliminate any uncertainty in the industry, government should adopt and maintain consistent and clear regulatory and licencing policies both before and after the structural review of the industry that Mr. Eric Dunne will be completing by December 15, 2003.

#71: Government should fully implement the recommendations contained in this report, except to the extent that the parties and government otherwise mutually agree.